



Department of Law

The Principle of State Liability for Judicial Breaches

**The case *Gerhard Köbler v. Austria* under
European Community law and from a
comparative national law perspective**

Kathrin Maria Scherr

Thesis submitted for assessment with a view to obtaining the degree of
Doctor of Laws of the European University Institute

Florence, August 2008

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Examining Board:

Prof. Jacques Ziller, European University Institute (Supervisor)
Prof. Bruno de Witte, European University Institute
Prof. Walter Van Gerven, Professor emeritus KU Leuven, U Maastricht, U Tilburg
Judge Horstpeter Kreppel, President of the First Chamber of the European Civil
Service Tribunal

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Meinen Eltern in Dankbarkeit

Acknowledgements

I have always found interesting that what an author brings to a close with his or her final lines in the acknowledgements, is what will constitute every reader's beginning. I have always liked the circularity of this idea. But now that it falls to me to write these final lines, what I like even more about it is that it places those precious people who have accompanied and guided me on all or at least parts of what has been a sometimes rocky, but mostly smooth and without doubt worthwhile journey, at the place where they belong: the first page. It is thanks to their support, advice, motivation and encouragement that I have arrived at this final step of writing these concluding words.

Foremost, I wish to express my considerable debt of gratitude to my supervisor, Prof. Jacques Ziller, for sharing my enthusiasm about this project from the very start and for offering unfailing support, guidance and advice, and for always being readily available to discuss ideas. I would also like to convey a special thank you to my former team and supervisors at the Legal Service of the European Commission, where I was fortunate enough to spend some time in 2003/04. It was there that I first stumbled upon the *Köbler* file and little did I know back then how significant this case would be for me in the years to come. Furthermore, I would like to thank Judge Koen Lenaerts, President of the Fourth Chamber of the Court of Justice of the European Union, and his entire cabinet, especially Ludovic Bernardeau, for welcoming me with open arms and for their comments, advice and understanding in the last hectic months of finishing my thesis. Finally, a special thank you to Annick Bulckaen and Françoise Thauvin for their always welcoming smiles and invaluable assistance over the years.

To Ewa Biernat, Vera Simon, Xiana Barros and above all Silvia D'Ascoli who have provided such supportive friendship and the very happy moments shared together here in Florence. A special mention also goes to all my other friends and colleagues at the European University Institute, among them Bernhard Knoll, Cormac Mac Amhlaigh and Martina Spornbauer. Last but not least, to Isabel for always being there for me.

I am also deeply indebted to my family for the constant and loving support they have given me throughout. My sister Tina, my brothers Daniel and Martin, my sister-in-law Doris and little Valentina, who has brought so much joy to us all. More thanks, gratitude, and love than I can express go to my parents, Karl and Erika, who have provided unconditional support, love and understanding, and who have always encouraged me to pursue all my dreams and endeavours. I am responsible merely for the content of this thesis; they are responsible for its existence. I find no adequate words to thank you, so I dedicate this thesis to you.

It would have been impossible to carry out such a large comparative project without the generous help I received from ‘my network of experts’, those people in the twenty-seven EU Member States, at the Court of Justice of the EU and at the European Court of Human Rights who so kindly agreed to complete my questionnaire and who have been so patient and helpful with my repeated questions and requests concerning the State liability regimes of their respective countries. This work would not have been possible without them and they deserve a special acknowledgement at this point. The following is a list of all the main collaborators (in alphabetical order):

Anneli Albi (*Estonia*), Håkan Andersson (*Sweden*), Ene Andresen (*Estonia*), Matej Avbelj (*Slovenia*), Ewa Bagińska (*Poland*), Elena Bargelli (*Italy*), Stanislaw Biernat (*Poland*), Michal Bobek (*Czech Republic*), Elisenda Casanas Adam (*Spain*), Matthias Cornils (*Germany*), Marise Cremona (*Malta*), Eugenia Dacoria (*Greece*), Ciara Damgaard (*Denmark*), Melivia Demetriou (*Cyprus*), Walter Dijkshoorn (*Netherlands*), Larisa Dragomir (*Romania*), Esther Engelhard (*Netherlands*), Johanna Engström (*Sweden*), Michael Faure (*Netherlands*), Jörg Gerkrath (*Luxembourg*), Agne Glodenyte (*Lithuania*), Jiří Hrádek (*Czech Republic*), Laura Ielciu (*Romania*), Mihail Iliev (*Bulgaria*), Jan Henrik Klement (*Germany*), Jiří Kmec (*Czech Republic*), Henning Koch (*Denmark*), Jan Komárek (*Czech Republic*), Veronika Korom (*Hungary*), Adam Lazowski (*Poland*), Mária Lokajová (*Slovakia*), Cormac Mac Amhlaigh (*Ireland*), Joana Mendes (*Portugal*), Attila Menyhárd (*Hungary*), Ana Raquel Moniz (*Portugal*), Roberta Muscat (*Malta*), Outi Mustajoki (*Finland*), Ken Oliphant (*United Kingdom*), André Dias Péreira (*Portugal*), Katja Plaustajner (*Slovenia*), Nina Póltorak (*Poland*), Elisabeth Poulou (*Greece*), Eoin Quill (*Ireland*), Georges Ravarani (*Luxembourg*), Pablo Martin Rodriguez (*Spain*), Enzo Roppo (*Italy*), Toomas Sillaste (*Estonia*), Ján Štiavnický (*Slovakia*), Eva Storskrubb (*Finland*), Tamara Takacs (*Hungary*), Christian Takoff (*Bulgaria*), Rimante Tamulyte (*Lithuania*), Prof. Luboš Tichý (*Czech Republic*), Christos Triantafyllides (*Cyprus*), Veselina Tzankova (*Bulgaria*), Willem H. van Boom (*Netherlands*), Attila Vincze (*Hungary*), Laris Vrahimis (*Cyprus*), Neil Walker (*United Kingdom*), Galina Zukova (*Latvia*)

Florence, August 2008

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Introduction

It took a certain time for the commentators to warm up, but after a slow start, the seminal ruling of the Court of Justice of the European Union in the case *Gerhard Köbler v. Republic of Austria*¹ set off an unprecedented academic race for contributions to the legal literature on European Community law. After all, *Köbler v. Austria* was the landmark decision providing the long-awaited affirmative answer to a question that had, anticipated by some, proscribed by others, nurtured speculation and caused repeated academic controversy over the years: the existence of a principle of Member State liability for breaches of European Community law committed by a national court adjudicating at last instance. A great deal of ink has since been used to comment on the Court's groundbreaking judgment of September 2003 and there is no end in sight to the flow of critical articles, disgruntled commentaries and heated discussions on the Court's ruling. Ever since the CJEU's legendary *Francovich* ruling,² the topic of Member State liability for breaches of European Community Law has inspired and challenged numerous writers and commentators, and has in the past seventeen years without doubt been one of the most popular tunes on the 'evergreen hit-list' of EU law topics. Briefly put, the general question of State responsibility and the specific principle of Member State liability in the European Community have given rise to an unprecedented amount of academic legal literature, so much in fact, according to Carol Harlow, as "to require an apology for any more".³

¹ C-224/01, *Gerhard Köbler v. Republic of Austria* [2003] ECR I-10239. Hereafter also referred to as "the Köbler case" or "Köbler".

² Joined Cases C-6 & 9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR I-5357. Hereafter also referred to as "the Francovich ruling".

³ CAROL HARLOW, "Francovich and the Problem of the Disobedient State" (1996) *European Law Journal* 2, p. 199. In a similar vein, PETER JANN, "Neuere Entwicklungen der Staatshaftung im Europäischen Gemeinschaftsrecht", *Haftung für staatliches Handeln - Österreichische Richterwoche*, 12.-16. Mai 2003 (Wien, Bundesministerium für Justiz, 2003), p. 17.

The *Köbler* case changed that. Indeed the current *Köbler*-hype brings back memories of one of the high points of popularity of the *Francovich*-doctrine in 1996, the year the CJEU pronounced the legendary follow-up ruling in *Brasserie du Pêcheur/Factortame*, clarifying a number of questions which had been left unanswered in its earlier decision in the *Francovich* case.⁴ The path-breaking *Köbler* ruling gives rise to serious reconsiderations of the principle of Member State liability for breaches of EC law and undoubtedly calls for a more detailed analysis of what has already been considered an exhaustively analysed doctrinal ‘evergreen’ of European Community law. It is precisely this new groundbreaking development which not only provides – to use the words of Carol Harlow – an “apology”⁵ to justify the following study, but also raises countless points of reflection that makes further analysis imperative. When reviewing the extant academic contributions on the topic, it is impossible to overlook the unusually harsh criticism and emotionally-charged nature of some of those commentaries. While academic writing is certainly not supposed to silence constructive criticism (in fact, one would hope that the opposite is the case), it does not require an expert on the *Köbler* case or State liability to understand that some of those voices in the literature are highly critical and denounce what many of them perceive to be a frontal attack by the CJEU on the national judiciary as a whole, and, above all, on the indefeasible position of national supreme courts.

At first glance, when looking at the *Köbler* ruling, these misgivings in the Member States appear incomprehensible. Claiming that the “application of the principle of State liability to judicial decisions has been accepted in one form or another by most of the Member States”,⁶ the CJEU seemed to be introducing nothing new or at least nothing entirely unknown to the legal systems of the (then) fifteen members. Moreover, as the Court seemed to imply, the *Köbler* ruling was the mere confirmation of a principle that had already existed in the CJEU’s early case-law on the question of State liability and certainly since the Court’s explicit reference to it in

⁴ Joined Cases C-46 & 48/93, *Brasserie Du Pêcheur SA v. Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others* [1996] ECR I-01029.

⁵ HARLOW, “Francovich...,” *supra* note 3, p. 199.

⁶ C-224/01, *Köbler*, *supra* note 1, para. 48.

the joined cases of *Brasserie du Pêcheur & Factortame*. In those cases, the Court was clear in holding that the “principle holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach.”⁷ The expansion of the *Francovich*-doctrine in *Köbler* to include also breaches of Community law committed by the national judiciary under the umbrella concept of Member State liability for violations of EC law was therefore the mere affirmation of a principle that had long been an integral part of the Community legal order.⁸

So why all the fuss? Critique of the Court’s jurisprudence is a permanent feature of academic commentary but it usually does not go beyond a short-lived stir among legal commentators. An initial uproar generally mellows down rather quickly only to become silent over time. However, *Köbler* seems to be different. For some reason critical voices appear to resonate ever more loudly in this case and their arguments seem to be more cogent. Furthermore, it is peculiar that discussions on the CJEU’s ruling in *Köbler* rather frequently evoke highly defensive discourses on national legal concepts and fundamental principles, on intangible values and long-standing legal traditions. What are the reasons for such furore about a judgment that was supposedly built on principles “generally acknowledged”⁹ in the laws of the Member States? How could something that is “common” be at the same time so divisive?

⁷ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 32. See also Case C-302/97, *Klaus Konle v. Republic of Austria* [1999] ECR I-3099, para. 62.

⁸ C-224/01, *Köbler*, *supra* note 1, para. 30. See also Opinion, Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, paras. 50 *et seq.*

⁹ Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 82.

i) Definition of subject and thesis

*A principle generally acknowledged by the laws of the Member States?*¹⁰

The current study focuses on the CJEU's assessment in *Köbler* of the various approaches to the question of Member State liability for judicial breaches under the national laws of the (then) fifteen EU Member States. The extension of the *Francovich*-line and the introduction of a concept of Member State liability for judicial breaches under European Community law were seen by the CJEU to be yet another addition to its long-standing case-law on Member State liability, which today constitutes one of the bedrock principles of the Community's legal system. When it comes to the principle of extra-contractual liability, be it of the EU Member States or the Community itself, the CJEU has repeatedly claimed to draw inspiration for its reasoning from common national legal concepts shared by the Member States.¹¹ "[P]rinciples common to the laws of the Member States" is, however, not a phrase that has been invented by the Court of Justice of the EU, but is rather an expression already used in the Treaty of Rome¹² to confirm that the foundations of non-contractual liability of the Community itself were based on such commonalities. However, an equivalent reference with respect to the concept of extra-contractual liability of the Member States is nowhere to be found in the primary or secondary sources of EC law.

Whatever meaning the founders of the Treaty might have attributed to those 'common principles' in Article 288(2) EC,¹³ for the question of Member State liability the CJEU alone holds the monopoly on their interpretation. However, so far the CJEU

¹⁰ With reference to Advocate General Léger's assertion in *Ibid*, para. 85.

¹¹ So also WALTER VAN GERVEN, "The Emergence of a Common European Tort Law: The EU Contribution - One Among Others" in S. Moreira De Sousa and W. Heusel (eds.), *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle* (Köln, Bundesanzeiger, 2004), p. 232.

¹² Article 288(2) EC (former Article 215(2) EC): "In the case of non-contractual liability, the Community shall, in accordance with *the general principles common to the laws of the Member States*, make good any damage caused by its institutions or by its servants in the performance of their duties." (emphasis added).

¹³ Former Article 215(2) EC.

has hardly ever included express references to the comparative analyses (which it undoubtedly undertakes) in its final judgments.¹⁴ In the *Köbler* case as well the Court once again left us in the dark as to precisely which commonalities it means when referring to the Member States' common legal principles and the method it employs to extract such principles from the national legal systems in the development of a similar framework under EC law. Briefly put, while the outcome of the Court's deliberations is clear and binding for the Member States, its comparative practice of 'law-making' remains as opaque as ever. In an attempt to verify the Court's conclusions, namely that the principle of State liability for judicial breaches has been accepted in most EU Member States,¹⁵ we will embark on a comparative analysis of the prevailing national legal concepts in the area of State liability for judicial breaches.

Though the Court remains silent on its methodological approach, the comparative component has without doubt grown to be a recurring theme in the Court's reasoning.¹⁶ Furthermore, comparative references can be found rather frequently in the Opinions of the Advocates General.¹⁷ More than that, the Court even explicitly referred to the comparative approach as a method of interpretation of Community law,¹⁸ a fact confirmed by a former President of the Court, Judge Mertens

¹⁴As Judge Lenaerts pointed out, the recent case-law of the CJEU contains even fewer references to comparative law than in the past. See KOEN LENAERTS, "Interlocking Legal Orders in the European Union and Comparative Law" (2003) 52 *International and Comparative Law Quarterly*, p. 874. A noteworthy exception in this respect is, for example, the Court's judgment in the Joined cases 7/56, 3/57 to 7/57, *Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v. Common Assembly of the European Coal and Steel Community* [1957] ECR 81, p. 118.

¹⁵ C-224/01, *Köbler*, *supra* note 1, para. 48.

¹⁶ See for example LENAERTS, "Interlocking legal...", *supra* note 14, p. 873. Supportive of the idea also ASTRID CZAJA, *Die außervertragliche Haftung der EG für ihre Organe* (Baden-Baden, Nomos Verl.-Ges., 1996), pp. 23 *et seq.*

¹⁷ See, for example, Joined cases 7/56, 3/57 to 7/57, *Algera*, *supra* note 14, p. 118. As for the Opinions of the Advocates General see in particular the Opinion by Advocate General Léger in the Case C-353/99 P, *Council of the European Union v. Heidi Hautala* [2001] ECR I-09565, in which Léger included an assessment of the laws of all the (then) fifteen Member States relating to the right of access to information by public authorities.

¹⁸ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 27: "Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court [...] to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States."

de Wilmars.¹⁹ In addition, one should also not underestimate the degree of legal comparison practised within the CJEU merely due to the fact that the judges come from different countries with different legal backgrounds.²⁰ Hence, the views held by single judges will always be directly or indirectly influenced by their respective national legal traditions.²¹

The criteria used by the CJEU in the course of its comparative analyses and the method applied to arrive at its final rulings are sources of constant speculation in academic literature. The situation is further complicated by the fact that since the Treaty is silent on this particular issue, there is no generally acknowledged definition of what the term ‘common principles’ really means, nor is there a uniform understanding on the methodology that needs to be employed in order to find them.²² The only point of consensus among academics is the identification of those comparative methodologies which the CJEU surely does *not* apply in its jurisprudence. So far there is widespread agreement that in order to identify common principles the Court does not compare the legal systems of all Member States with each other. The procedure of filtering a common minimal standard out of all the equivalent national legal orders is apparently out-dated and no longer used in practice.²³

In the past numerous suggestions have been made as to how best to approach this issue. Parts of the literature suggested simply using the best and most advanced solution offered by all the different legal systems.²⁴ However, according to Wurmnest

¹⁹ MERTENS DE WILMARS, "Le droit comparé dans la jurisprudence de la Cour de justice des Communautés européennes " (1991) *Journal des Tribunaux*, p. 37.

²⁰ LENAERTS, "Interlocking legal...", *supra* note 14, p. 874.

²¹ In this context *Hilf* speaks of "a working laboratory of comparative law". See MEINHARD HILF, "Comparative Law and European Law" in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. I (Amsterdam, North-Holland Publishing Co, 1992), p. 698.

²² CZAJA, *Die außervertragliche Haftung...*, *supra* note 16, p. 20.

²³ WOLFGANG WURMNEST, *Grundzüge eines Europäischen Haftungsrechts* (Tübingen, Mohr Siebeck, 2003), p. 17.

²⁴ Opinion of Advocate General Roemer in Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Communities* [1971] ECR 00975, p. 989.

and others,²⁵ what clearly speaks against the application of such a technique is the fact that the solution provided by one single national system could hardly be representative of a legal principle which could prove to be effective across the whole Community. Moreover, what disqualifies this method even further is that the selection criteria are rather subjective instead of being based on objective standards. Similar objections can be voiced against choosing a system that represents best the interests of the Community.²⁶ Identifying common legal principles on the basis of such criteria is not an objective way of proceeding and therefore hardly a useful method in practice.

Overall, studies have revealed that in the process of formulating common principles of EC law the CJEU does not necessarily follow one single method.²⁷ Bluntly put, the national systems merely serve as a pool from which the CJEU can pick and choose solutions if and however it wants to.²⁸ As Judge Koen Lenaerts stated, “the comparative law method, when applied by the Community judge, is driven by a single leitmotif, and that is to find through the examination of other legal orders the solution which best suits the objectives of the Community.”²⁹ In the literature the method termed ‘*wertende Rechtsvergleichung*’³⁰ has been used to label the procedure followed by the CJEU in identifying such general principles of Community law. Over the years this terminology has also been adopted by several Advocates General, among them Advocate General Roemer, who gave a well-known

²⁵ WURMNEST, *Grundzüge...*, *supra* note 23, p. 17; CZAJA, *Die außervertragliche Haftung...*, *supra* note 16, pp. 25 *et seq.*

²⁶ WURMNEST, *Grundzüge...*, *supra* note 23, pp. 17 *et seq.*

²⁷ DANIEL EWERT, *Die Funktion der allgemeinen Rechtsgrundsätze im Schadensersatzrecht der Europäischen Wirtschaftsgemeinschaft* (Frankfurt a.M./Bern/New York, Lang, 1991), p. 346

²⁸ In a similar vein, WURMNEST, *Grundzüge...*, *supra* note 23, p. 17. See also WALTER MUCH, “Die Haftung der Europäischen Gemeinschaften für das rechtswidrige Verhalten ihrer Organe” in H. Mosler (ed.), *Liability of the State for Illegal Conduct of its Organs: National Reports and Comparative Studies - International Colloquium, Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, 1964* (Köln, Carl Heymanns Verlag KG, 1967), p. 727.

²⁹ KOEN LENAERTS, “Interlocking Legal Orders or the European Union Variant of E Pluribus Unum” in G. Canivet *et al.* (eds.), *Comparative Law before the Courts* (London, The British Institute of International and Comparative Law, 2004), p. 105.

³⁰ ‘Comparative method including discretionary elements’; the notion was first introduced by KONRAD ZWEIGERT, “Der Einfluß des Europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedstaaten” (1964) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 28, p. 611. See also WURMNEST, *Grundzüge...*, *supra* note 23, pp. 16 *et seq.*

account of the CJEU's method of comparison in his Opinion in the *Schöppenstedt* case.³¹ In a similar manner, the Advocate General in the *Köbler* case, Philippe Léger, also declared that it was

settled case-law that, in order to acknowledge the existence of a general principle of law, the Court does not require that the rule be a feature of all the national legal systems. [...] The Court merely finds that the principle is generally acknowledged and that, beyond the divergences, the domestic laws of the Member States show the existence of common criteria.³²

Despite the occasional interpretative reading of the Court's practice by an Advocate General, the CJEU itself remains silent about the comparative methodology it employs in its jurisprudence to this day.

Notwithstanding the CJEU's discretion regarding its comparative law assessments, we are confronted with a rather peculiar situation in the *Köbler* case. A rare glimpse into the tools employed to achieve the comparative outcome was recently offered by Advocate General Léger in his Opinion in the case.³³ The comparative analysis undertaken by the Advocate General and the conclusions drawn from it were to a large extent based on a comparison of the different systems of State liability for judicial breaches in the (then) fifteen EU Member States. While Léger initially also referred to the principles of international law and especially the concept of State unity as set out in Article 4(1) of the International Law Commission's draft articles on State responsibility³⁴ in order to confirm the applicability of this principle under

³¹ See Opinion of Advocate General Roemer in the Case 5/71, *Schöppenstedt*, *supra* note 24, p. 989, in which he stated that “[f]or Community law the criterion is not only rules which exist in *all* Member States, nor is the lowest common denominator determinative nor does ‘the rule of the lowest limit’ apply. Rather what is indicated – as always when judicial decisions are arrived at by references to general principles – a process of assessment in which above all the particular objectives of the Treaty and the peculiarities of the Community structure must be taken into account.”

³² C-224/01, *Köbler*, *supra* note 1, para. 85.

³³ Opinion of Advocate General Léger in *Ibid*, paras. 77-86.

³⁴ *Draft Articles on Responsibility of States for internationally wrongful acts* adopted by the International Law Commission at its fifty-third session, November 2001, and approved by a resolution of the General Assembly of the United Nations, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10 (A/56/10), chp.IV.E.1; hereafter also referred to as ‘ILC Draft Articles’.

Community law too, he substantiated his arguments by an explicit reference to the results of his comparative analysis. In fact, in his Opinion Léger expressly mentioned all fifteen Member States and referred to their State liability regimes as having been a crucial factor in reaching his conclusions for an applicable model under Community law.³⁵

This is precisely the point where *Köbler* so clearly differs from the Court's earlier judgment in *Brasserie du Pêcheur & Factortame*.³⁶ In the latter case the Court had, despite evidence to the contrary in the Member States' domestic structures, introduced the principle of State liability for legislative breaches of Community law. Nevertheless, whatever method of interpretation the Court might have used in the end to justify the introduction of such a principle under EC law, neither the Court nor Giuseppe Tesauro, the Advocate General in the case, proceeded by explicitly referring to the Member States' respective national frameworks of State liability for legislative breaches.³⁷

In *Köbler*, however, the evidence is too solid to be denied. It is obvious from Advocate General Léger's reasoning that besides his reference to international law, he made his assumptions by relying heavily on a comparative overview of the legal situation in the (then) fifteen Member States,³⁸ all of which led him to conclude that in his understanding

all the Member States accept the principle of State liability for judicial acts.

All - except for the moment Ireland - accept that principle in respect of judgments themselves where they infringe legal rules applicable in their territory, in particular where there is a breach of fundamental rights.³⁹

³⁵ See Opinion, Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 80.

³⁶ C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 1 *et seq.*

³⁷ *Ibid*, paras. 20 *et seq.*; see also, Advocate General Tesauro in C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 1 *et seq.*

³⁸ The Member States explicitly listed in Advocate General Léger's Opinion are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain and Sweden.

³⁹ Opinion, Advocate General Léger in the case C-224/01, *Köbler*, *supra* note 1, para. 77.

In support of his previous statement the Advocate General went on to present more country-specific comparative evidence by claiming that:

[a]ll the other Member States (The Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Spain, the Italian Republic, the Grand Duchy of Luxembourg, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden) - excluding the Hellenic, Portuguese and French Republics, where the situation is evolving and more nuanced - accept the principle of State liability irrespective of the nature of the legal rule infringed.⁴⁰

Despite the undoubted significance for the overall assessment of the case, Advocate General Léger's comparative analysis on the question of State liability for judicial breaches in all the EU Member States was dealt with in a rather precipitous manner. After all, the Advocate General devoted only eight out of the 174 paragraphs in his Opinion to presenting his comparative results for fifteen different Member States and the common principles they shared, before reaching his conclusions in the case, which were later confirmed by the CJEU in its final ruling.⁴¹ Moreover, it is rather unfortunate that the Advocate General did not reveal the method and the material he used in the course of his comparative research. All that naturally leaves us puzzled and above all curious as to the well-foundedness of his claim. For the Court, Léger's findings were, however, sufficient to conclude that it followed "from this comparative legal analysis that the principle of State liability for the acts or omissions of supreme courts can be acknowledged as a general principle of Community law".⁴² Notwithstanding the method used by the CJEU to extract 'common principles' from the laws of the Member States, as far as the *Köbler* judgment is concerned, the Court explicitly confirmed that in the course of its reasoning it directly relied on the

⁴⁰ Opinion Advocate General Léger in *Ibid*, para. 80.

⁴¹ In line with the Opinion of the Advocate General, the Court concluded in its judgment that: "[A]pplication of the principle of State liability to judicial decisions has been accepted in one form or another by most of the Member States, as the Advocate General pointed out at paragraphs 77 to 82 of his Opinion." *Ibid*, para. 48.

⁴² *Ibid*, para. 85.

comparative analysis previously undertaken by Advocate General Léger in his Opinion in the case.⁴³ Overall, it would therefore be rather difficult to deny that the CJEU was guided by the Advocate General's results when reaching its conclusions that the "application of the principle of State liability to judicial decisions has been accepted in one form or another by most of the Member States."⁴⁴

Our aim is therefore straightforward. We seek to complete the comparative analysis which the CJEU and the Advocate General started, but left unfinished in the *Köbler* case. We will attempt to verify whether the EU-wide systems of State liability for judicial breaches are – as argued by the Court – indeed guided by principles common to the laws of the Member States. In doing so, we endeavour to answer the following questions. Based on the methodology applied by the Advocate General in his comparative findings, was the Court correct to talk about common principles of the Member States? And if so, did the Court's conclusion in this case "take the pulse of the national legal systems, to find the best solution in the middle-line?"⁴⁵

These considerations are the starting point of a challenging and extensive project, which will lead us through the colourful and diverse spectrum of State liability for judicial breaches in an enlarged European Union of 27 Member States. We endeavour to examine all 27 different national legal systems and to inquire about the differences in their concepts of State liability for judicial errors. Thereby, we will also seek to find proof for the existence of principles common to the traditions of the Member States.

In this context, it is, however, important to clarify at the outset that this thesis does not claim to provide a detailed analysis of 27 national liability schemes, nor does it purport to cover all the substantive and procedural aspects involved when it comes to the general question of State liability for judicial breaches. Moreover, it is important to underline that the objective of the present study is not to develop a

⁴³ Ibid, para. 85.

⁴⁴ Ibid, para. 48.

⁴⁵ LENAERTS, "Interlocking Legal Orders...", *supra* note 14, p. 133.

standard European model or a uniform solution to the intractable problem of State liability for judicial errors. Apart from the fact that our endeavour to provide a general overview of 27 different legal systems is already a substantial undertaking, it would be – at least in the realms of this study – an impossible aspiration to merge them into one perfectly efficient system. Such an ambition would in any case be redundant in light of the fact that the CJEU has already confronted us with a *fait accompli* in the *Köbler* ruling, which contains the uniform solution to this problem on the Community level, though whether it is also the perfectly efficient one is another question.

Instead, the fundamental feature of our work is that it compares, analyses, defines and classifies the existing regimes of State liability for judicial breaches in the EU without pursuing an evaluative assessment. What is far more important for the purposes of our study is the question of how to combine the different national schemes of State liability for judicial breaches that emerge from the 27 Member States.⁴⁶ What common criteria and characteristics can be identified that would allow us to group the different national systems and to draw up a valid scheme of classification? Which ‘type’ of State liability for judicial breaches plays a dominant/marginal role among all the systems represented in the European Community? Finding the answers to these questions is the primary task of this study.

In sum, the goals of this comparative project are twofold. First, we seek to provide a legal cartography that sketches out a rough overview of the different approaches towards State liability for judicial breaches within the European Community and at the same time arranges and classifies the various national systems in some functional and explanatory way. Our second objective is somewhat more practical. We wish to provide a clear framework the reader can use in order to better understand the responses and the critical comments, which in the immediate aftermath of the *Köbler* ruling, came from every corner of the European Union. The criticisms and arguments made in favour of discarding the newfound *Köbler* principle have been most frequently coloured by the critic’s national legal background and the

⁴⁶ A similar approach has been adopted in WALTER VAN GERVEN, "Casebooks for the common law of Europe: Presentation of the project" (1996) *European Review of Private Law* 4, pp. 68 *et seq.*

understandable influences of national legal traditions, particular provisions of national law, leading national cases and doctrinal influences. These comments appear difficult to retrace without any prior knowledge of the country's general legal framework in the area. In the numerable but in many cases unjustified critiques of the *Köbler* case, authors frequently invoke the most obvious contradictions and ostensible clashes arising between their respective national framework and *Köbler*'s extension of the longstanding *Francovich*-doctrine. In an attempt to lessen the incomprehension on the national as well as the CJEU's side, we hope to build a conceptual bridge between the national systems on the one hand and the respective national responses to the *Köbler* case on the other.⁴⁷

ii) Overall frame and structure of the thesis

As a starting point, the first chapter of this thesis will be devoted to an analysis of the *Köbler* judgment itself.⁴⁸ Questions related to the implications, the framework, the limits and conditions of this unprecedented decision will be addressed here. Moreover, we will outline the circumstances which led to the CJEU's ruling. In the course of the analysis, we will also provide a brief narrative of the Court of Justice's most significant rulings in its development of the Community law principle of Member State liability.

Having set out the development of this principle, we can then begin our comparative analysis. As any comparative study is only ever as good as its underlying methodology, chapter II will first outline the basic parameters, methodological tools and concepts employed in the course of this thesis. Only after the tools and the method are clear will we proceed to an analysis of the wide spectrum of national models of State liability for judicial acts across the EU. The questionnaire, which has been designed especially for this purpose, is at the centre of the examination of the different national concepts. Country-specific information will predominantly be

⁴⁷ See also MAURO BUSSANI and VERNON VALENTINE PALMER, "The liability regimes of Europe - their facades and interiors" in M. Bussani and V. V. Palmer (eds.), *Pure economic loss in Europe* (Cambridge/New York, Cambridge University Press, 2003), pp. 120 *et seq.*

⁴⁸ C-224/01, *Köbler*, *supra* note 1, paras. 1 *et seq.*

extracted from the number of questionnaires which have been completed by a large pool of country experts consisting of judges, professors, practitioners and law students across Europe.

Chapter II also aims to sift the wealth of information we have obtained so as to provide a preliminary overview of the diverse spectrum of national legal concepts of State liability for judicial wrongs in force in the 27 EU Member States. The different manifestations of judicial responsibility in various countries are often based on specific nationally-driven attitudes, social factors, traditions and values such as the degree of judicial prestige, the openness of judicial proceedings and the status of the judiciary within the overall State apparatus. Briefly put, judicial responsibility is a value-laden concept that reflects “a certain relationship of the subject to social values”.⁴⁹ However, as social values and traditions differ among societies, diversity is an inevitable feature of the topic under discussion. Despite the differences between systems that we will encounter in the course of this project, we will nevertheless try to identify common traditions and overlapping approaches among the various national concepts of State liability for judicial breaches. The outcome of this analysis will then allow for the categorisation of the different systems into specific, pre-defined groups and for the creation of a general taxonomy of the various national approaches to the question. In this way we hope to achieve comparable results, from which the CJEU might have drawn inspiration for its jurisprudence on the matter.

Chapters III, IV, V and VI of the thesis will then shed light on the scheme of public liability in a number of selected Member States. Based on the classificatory scheme developed in chapter II, each group of countries will be represented by one prototype, i.e. one national system. The prototypes we have chosen to represent our four categories are the United Kingdom, Austria, France and Belgium. Not only will we examine the general framework and composition of the respective State liability regime, but we will also contrast the *Köbler* judgment with the effective framework of State liability in the representative national prototypes and analyze in particular the

⁴⁹ W. WEILER, *Zur Kategorie der Verantwortung* (1965), quoted in MAURO CAPPELLETTI, *The Judicial Process in Comparative Perspective* (Oxford, Clarendon Press, 1989), p. 59.

substantive and procedural difficulties that might arise in the course of the application of the *Köbler*-principle under each national remedial framework. The fact that under domestic law the notion of State liability for judicial breaches is often a heavily restricted concept, also has unexpected consequences for the implementation of the respective principle deriving from Community law, which is, according to the principle of national procedural autonomy, in the hands of the Member States. And, in fact, as the reader will see, the *Köbler* ruling has already caused serious institutional and procedural difficulties in various Member States.

Against this background, the analysis of our prototypes in chapters III to VI will also illustrate how the influence of the common national principles on the Community-law framework of non-contractual liability is far from being one-sided. The situation has transformed into a reciprocal exchange between the concept of non-contractual liability on the Member State and the Community level. Our prototypes will provide evidence for the fact that ever since the CJEU's ruling in *Francovich*, the 'matured' and constantly evolving principle of Member State liability under EC law is bouncing back into the various national liability regimes through – what has been termed – the 'spill-over effect'. This might also allow us to substantiate our tentative predictions about the application of the *Köbler* principle in the various Member States.

We begin, however, with the story of Gerhard Köbler, the German professor who wanted nothing more than the financial recognition of his long-time service as a university professor in Austria and Germany...

PART I

The principle of Member State liability for judicial breaches under European Community law

CHAPTER I.

THE JUDGMENT GERHARD KÖBLER V. REPUBLIC OF AUSTRIA

One future day the European Court will be asked to say, straightforwardly, whether Community law requires a remedy in damages to be made available in the national courts to those who sustain loss as a result of breach of the Treaty by public authorities.⁵⁰

That day arrived long ago. In fact, over the past seventeen years the CJEU has been and continues to be the motor of the development of the individual's right to seek redress from the State for breaches of European Community law. Until today, this principle continues to be a moving target in the jurisprudence of the CJEU. A vivid proof for that was the Court's recent *Köbler* ruling.

⁵⁰ AMI BARAV, "Damages in the Domestic Courts for Breach of Community Law by National Public Authorities" in H. G. Schermers *et al.* (eds.), *Non-contractual liability of the European Communities* (Dordrecht/Boston, Martinus Nijhoff, 1988), p. 165.

I. The case *Gerhard Köbler v. Republic of Austria* (C-224/01)

1. Origin and scope of the action

a) The factual and legal background of the case at the national level

Gerhard Köbler, a German national, had been working under a public law contract as an ordinary university professor in Innsbruck (Austria) since March 1986. Prior to this, Mr. Köbler had been employed at several universities in Germany. In the course of his appointment at the University of Innsbruck, Mr. Köbler applied by letter dated 28 February 1996, for a special length-of-service increment to be taken into account in the calculation of his retirement pension. Based on Article 50a of the (now amended) *Gehaltsgesetz*, the Austrian Law on Salaries, this increment, or ‘*Dienstalterszulage*’ as it has been termed in German, was granted to university professors who, in addition to a set of other requirements, had completed fifteen years of service as a professor exclusively at Austrian universities or specified institutions of higher education in the country.⁵¹

While at the time of his application for the special length-of-service increment in February 1996, Mr. Köbler had only completed 10 years in the capacity of an ordinary university professor in Austria, he argued that the periods of service at universities of other Member States of the European Community also had to be taken into account in the calculation of his total years of service. In doing so, the total

⁵¹ Article 50a *Gehaltsgesetz* 1956, BGBl Nr. 54 in der Fassung der 31. Gehalts-Novelle BGBl Nr. 662/1977 (hereinafter also referred to as “GG”): “A university professor (Article 21 of the UOG 1993) or an ordinary professor at a university or an institution of higher education who has completed 15 years service in that capacity in Austrian universities or institutions of higher education and who for four years has been in receipt of the length-of-service increment provided for in Article 50(4) shall be eligible, with effect from the date on which those two conditions are fulfilled, for a special length-of-service increment to be taken into account in the calculation of his retirement pension the amount of which shall correspond to that of the length-of-service increment provided for in Article 50(4).” English translation of Article 50a GG as in C-224/01, *Köbler*, *supra* note 1, para. 4. *Nota bene*: In reaction to the CJEU’s ruling in the *Köbler* case, Article 50a GG has in the meantime been changed accordingly. A new paragraph (4) was added that brings the law in line with the requirements under Community law (see BGBl I Nr. 130/2003 of 30 December 2003).

calculation would eventually amount to the requisite length of service.⁵² Notwithstanding Köbler's reasoning, his application for the grant of the special length-of-service increment was rejected on the grounds that he did not fulfil the entire set of conditions, which had been laid out in Article 50a of the Austrian Law on Salaries. *In concreto*, the competent Austrian ministry, the *Bundesministerium für Wissenschaft Verkehr und Kunst*,⁵³ referred to the fact that Article 50a *Gehaltsgesetz* made the receipt of the special length-of-service increment conditional upon fifteen years' service as a professor *exclusively* at Austrian universities.⁵⁴ Following the official refusal of the special increment, Köbler lodged an appeal before the *Verwaltungsgerichtshof*, the Austrian Supreme Administrative Court or *VwGH*.⁵⁵ Based on the argument that in the calculation of the total number of years of service required for the grant of the special increment the provision of Article 50a *GG* purposely excluded periods of service spent at universities outside Austria, Köbler claimed that this specific regulation of the Austrian Law on Salaries amounted to indirect discrimination and therefore violated Community law, namely the general principle of freedom of movement for workers as regulated in Article 39 EC⁵⁶ and Article 7 of the Council Regulation No 1612/68.⁵⁷ Confronted with Köbler's appeal, the *VwGH* made a reference for a preliminary ruling to the Court of Justice of the EU on the basis of Article 234(3) EC.⁵⁸

At a certain stage in the proceedings, the *VwGH* was notified by the Registrar of the CJEU of a recent ruling issued by the Court in the case *Schöning-*

⁵² Ibid, paras. 5-6. For a comprehensive outline of the factual background of the case see, *inter alia*, PETER SCHWARZENEGGER, "Case Note on Case C-224/01 Köbler" (2003) *ZfRV*, pp. 236 *et seq.*

⁵³ Austrian Federal Ministry for Science, Transport and Arts.

⁵⁴ Decision of 10 June 1996 of the Austrian Federal Ministry for Science, Transport and Arts (GZ 98.864/1-I/A/1/96).

⁵⁵ Hereinafter also referred to as "*VwGH*". Appeal to the Supreme Administrative Court according to Article 131(1) of the Austrian Constitution, 25 July 1996 (GZ 98.864/1-I/A/1/96).

⁵⁶ Former Article 48 EC.

⁵⁷ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

⁵⁸ Decision of the Austrian Supreme Administrative Court of 22 October 1997 (Zl. 96/12/0250-6).

Kougebetopoulou.⁵⁹ The Registrar subsequently sent a letter to the *VwGH* on 11 March 1998, asking whether in light of the CJEU's ruling in this specific case, the *VwGH* still considered it necessary to maintain its earlier request for a preliminary ruling. Consequently, by order of 25 March 1998, the *VwGH* asked the parties in writing to submit their comments on the Registrar's request within a deadline of two weeks. However, in that same order the Court further added that in light of the CJEU's judgment in the case *Schöning-Kougebetopoulou* the question, which had been referred to the CJEU for a preliminary ruling, had apparently been resolved in favour of the plaintiff.⁶⁰

Following the Registrar's notification, the *VwGH* withdrew its reference for a preliminary ruling on 24 June 1998 and by judgement of the same day ultimately declared that the special length-of-service increment as foreseen in Article 50a GG qualified as a loyalty bonus ('*Treueprämie*'), which would in fact justify a deviation from the principle of free movement for workers under Community law.⁶¹ This was contrary to its order for a preliminary reference to the CJEU of 22 October 1997, in which the *VwGH* had stated that the special-length-of-service increment neither qualified as a loyalty bonus nor as a reward,⁶² and also contrary to its initial stance on the question in its order of 25 March 1998. The *VwGH* therefore rejected Mr Köbler's application by decision of 24 June 1998.⁶³ Following the judgment, Mr. Köbler brought an action for damages against the Republic of Austria before the

⁵⁹ C-15/96, *Schöning-Kougebetopoulou v. Freie und Hansestadt Hamburg* [1998] ECR I-47.

⁶⁰ Order of the Supreme Administrative Court of 25 March 1998 (Zl. 96/12/0250-9): "*Der Verwaltungsgerichtshof geht vorläufig davon aus, daß durch das genannte Urteil die im Vorabentscheidungsverfahren anhängig gemachte Rechtsfrage tatsächlich zugunsten des Beschwerdeführers gelöst worden ist.*"

⁶¹ Decision of the *VwGH*, 24 June 1998 (Zl.98/12/0167-14).

⁶² Accordingly, in its reference for a preliminary ruling the Supreme Administrative Court had stated that the special length-of-service increment "*weder der Charakter einer Treueprämie noch einer Belohnung zukommt, sondern [...] einen Bezugsbestandteil im Rahmen des Vorrückungssystems darstellt [...]*"; Decision of the *VwGH* of 22 October 1997 (Zl. 96/12/0250-6), p. 8.

⁶³ Decision of the Austrian Supreme Administrative Court, 24 June 1998 (Zl. 98/12/0167-14), p. 15: "*Da es sich bei dem in Frage stehenden vermeintlichen Anspruch des Beschwerdeführers auf eine besondere Dienstalterszulage nach § 50a GG 1956 um eine gesetzlich vorgesehene Treueprämie handelt und eine solche Regelung aus den dargelegten Gründen vom EuGH als Rechtfertigung einer in einem gewissen Spannungsverhältnis zum Diskriminierungsverbot stehenden Regelung anerkannt wird, erweist sich die Beschwerde als unbegründet.*"

Landesgericht für Zivilrechtssachen Wien,⁶⁴ the Regional Civil Court of Vienna, claiming that the *VwGH*'s ruling in the case gravely violated his rights under Community law. He argued that Austria was to be held liable for the damage he had sustained as a result of the *VwGH*'s earlier judgment in the case. Faced with these allegations, the Regional Civil Court of Vienna subsequently decided to refer several questions for a preliminary ruling to the CJEU on the basis of Article 234 EC.⁶⁵

b) The questions at the heart of the preliminary reference proceedings before the CJEU

The *Landesgericht für Zivilrechtssachen Wien* submitted five questions in total to the CJEU, out of which the first two concerned the general principle of Member State liability as established under Community law. The *Landesgericht* asked the Court in general terms whether according to the CJEU's established *Francovich*-doctrine, Member State liability could also be invoked by breaches of EC law committed by the national judiciary, and in particular by national courts adjudicating at last instance. If this was the case, the court continued, would the principle of national procedural autonomy still leave it up to the Member States to determine which national court would be competent to rule in such a case?⁶⁶ At that point the Austrian Court did not desist from underlining that according to Austrian law⁶⁷ the decisions of the three highest courts in the country, namely the *Verfassungsgerichtshof*,⁶⁸ the *Oberste Gerichtshof*,⁶⁹ and the *Verwaltungsgerichtshof*,⁷⁰ could never give rise to the State's liability. The first couple of questions therefore clearly touched on an unresolved issue regarding the

⁶⁴ Hereinafter also referred to as "*Landesgericht*".

⁶⁵ *Landesgericht für ZRS Wien*, 07.05.2001, 31 Cg 1/01x-6. As will be demonstrated later, the Regional Civil Court of Vienna was in fact not even competent in the first place to rule upon this matter.

⁶⁶ C-224/01, *Köbler*, *supra* note 1, para. 14.

⁶⁷ Article 23 *Bundes-Verfassungsgesetz* and Article 2(3) *Amtshaftungsgesetz BGBl 1949/20*.

⁶⁸ The Austrian Constitutional Court; hereinafter also referred to as "*VfGH*".

⁶⁹ The Supreme Court in civil and commercial, social security, employment law and criminal law matters; hereinafter also referred to as "*OGH*".

⁷⁰ The Supreme Administrative Court.

established principle of Member State liability, insofar as the CJEU had never explicitly ruled on this question before.

The second set of questions submitted by the Austrian Court related to the substantive side of the case. More precisely, the *Landesgericht* asked the CJEU to rule on the question as to whether the *VwGH*'s classification of the special length-of-service increment as a loyalty bonus was compatible with Community law.⁷¹ Last but not least, the Austrian Court sought confirmation from the Court of Justice on whether the CJEU itself would rule in the case or whether it was on the *Landesgericht* alone to determine if the *Verwaltungsgerichtshof* had overstepped the limits of discretion in its final ruling in the case, so as to fulfil the conditions to invoke the liability of the Austrian State in the case of Mr. Köbler.⁷²

2. The CJEU's *Köbler* judgment

a) The question of attribution

Confronted with an explicit request for a preliminary ruling by the Vienna Regional Civil Court, the CJEU issued its judgment in the case on 30 September 2003. As far as the substantive side of the case was concerned, the Court ruled, *inter alia*, on the general compatibility of a loyalty bonus with Community law. In line with the Opinion of the Advocate General, the CJEU stated however that the judgment in *Schöning-Kougebetopoulou*⁷³ had not answered this question with undisputable finality and that “the inferences drawn by the *Verwaltungsgerichtshof* from that judgment are based on an incorrect reading of it.”⁷⁴ The CJEU elaborated on this point by arguing that, in certain cases, a loyalty bonus might constitute a pressing public interest reason and thus justify a deviation from Community law. However, in the present case, the CJEU continued, such a justification would clearly not hold as

⁷¹ C-224/01, *Köbler*, *supra* note 1, para. 14, point (3).

⁷² *Ibid*, para. 14, point (5).

⁷³ C-15/96, *Schöning-Kougebetopoulou*, *supra* note 59, paras. 1 *et seq.*

⁷⁴ C-224/01, *Köbler*, *supra* note 1, para. 116.

the specific length-of-service increment in Austria not only rewarded an employee's loyalty to his/her employer, but also led to "a partitioning of the market for the employment of university professors in Austria," which was contrary to the principle of freedom of movement for workers according to Article 39 EC.⁷⁵ On these grounds, the CJEU concluded that the Supreme Administrative Court had been mistaken when it had precipitately qualified the particular increment under Article 50a GG as a loyalty bonus in its final decision and had subsequently announced that the strict requirements attached to the particular increment under Article 50a GG were justified under Community law.⁷⁶

In reply to the first two questions that had been referred to the CJEU by the Austrian Court regarding the applicability of the *Francovich*-line to cases when the breach of Community law was attributable to a court of last instance, the CJEU issued a landmark ruling that was unprecedented with respect to the Court's settled case-law on the question of Member State liability. In fact, the Court added yet another novelty to its case-law, which had so decisively guided and influenced the development of this concept under Community law ever since its seminal *Francovich* ruling. In that case,⁷⁷ the CJEU had set the foundations for what is seventeen years later one of the most fundamental principles of European Community law: the maxim of extra-contractual liability of the EU Member States for breaches of Community law.

In *Francovich*, the CJEU had created a remedy under Community law enforceable by individuals in their national courts against defaulting Member States.⁷⁸ Furthermore, the Court argued that this newly-created concept of State liability for breaches of EC law was in fact a principle "inherent in the system of the Treaty".⁷⁹

⁷⁵ Ibid, para. 86. For the detailed reasoning of the Court on whether a loyalty bonus can justify an obstacle to the freedom of movement for workers, see C-224/01, *Köbler*, *supra* note 1, paras. 80-88.

⁷⁶ C-224/01, *Köbler*, *supra* note 1, paras. 86-88.

⁷⁷ C-6 & 9/90, *Francovich*, *supra* note 2, paras. 1 *et seq.*

⁷⁸ See Ibid, para. 33: "The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible."

⁷⁹ Ibid, para. 35.

With reference to Article 10 EC,⁸⁰ the CJEU stated that among the measures which Member States must take in order to ensure the fulfilment of their obligations under Community law, was the obligation to nullify the unlawful consequences of a breach of EC law. With respect to the specific question of attribution, in *Francovich* the Court had targeted the Italian legislature for the non-implementation of an EC Directive,⁸¹ which had caused harm to several individuals.⁸² The CJEU's groundbreaking *Francovich* judgment was soon followed by several decisions in cases concerning a Member State's failure to implement directives, such as *Wagner Miret*⁸³, *Faccini Dori*⁸⁴ and *El Corte Inglés*.⁸⁵

A second milestone in the development of the principle of Member State liability under Community law was the Court's well-known ruling in the joined cases *Brasserie du Pêcheur/Factortame*.⁸⁶ While in *Francovich* the Court had exclusively mentioned Article 10 EC⁸⁷ as the legal basis for the newfound remedy under EC law, it is interesting to note that only five years later in its ruling in *Brasserie du Pêcheur/Factortame* the CJEU resorted for the first time to the "principles common to the Member States" as a legal basis and source upon which it had created the

⁸⁰ Article 10 (former Article 5) EC: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community [...]"

⁸¹ Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (Official Journal 1980 L 283, p. 23). C-6 & 9/90, *Francovich*, *supra* note 2, paras. 1 *et seq.*

⁸² The literature on the CJEU's *Francovich* ruling is extensive. For detailed analyses see, for example AMI BARAV, "Damages against the State for Failure to Implement EC Directives" (1991) *New Law Journal*, pp. 1584 *et seq.*; HARLOW, "Francovich...", *supra* note 3; JUTTA GEIGER, *Der gemeinschaftsrechtliche Grundsatz der Staatshaftung* (Baden-Baden, Nomos Verlagsgesellschaft, 1997); WALTER VAN GERVEN, "Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe" (1994) *Maastricht Journal of European and Comparative Law* 1, pp. 6 *et seq.*; NICHOLAS EMILIOU, "State liability under Community law: shedding more light on the Francovich principle?" (1996) 21 *ELR* 5, pp. 399 *et seq.*; FRITZ OSSENBUHL, "Staatshaftung zwischen Europarecht und nationalem Recht" in O. Due *et al.* (eds.), *Festschrift für Ulrich Everling* (Baden-Baden, Nomos, 1995), pp. 1031-1047; *et al.*

⁸³ Case C-334/92, *Wagner Miret v. Fondo de garantía salarial* [1993] ECR I-6911.

⁸⁴ Case C-91/92, *Paola Faccini Dori v. Recreb Srl*. [1994] ECR I-03325.

⁸⁵ Case C-192/94, *El Corte Inglés v. Blázquez Rivero* [1996] ECR I-1281.

⁸⁶ C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 1 *et seq.*

⁸⁷ Former Article 5 EC.

Francovich-doctrine under Community law.⁸⁸ While targeting the German, as well as the UK legislature for national laws that were in breach of EC law,⁸⁹ the Court clarified and refined some of the general conditions of Member State liability for breaches of EC law that it had established in its earlier *Francovich* ruling.⁹⁰ Even though the Court had so far only expressly ruled on the liability of Member States in cases of legislative breaches of EC law, it was precisely in this famous judgment that the CJEU also clarified matters with respect to the question of attribution and established – in the words of Tridimas⁹¹ – “the universality of State liability”:

It is for each Member State to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with Community law, *whichever public authority* is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation.⁹²

Hence, the Court of Justice declared that the principle of Member State liability could be imposed irrespective of the national organ responsible for the breach, and argued that, as a matter of principle, all State authorities were bound to apply the rules established under Community law.⁹³ Thereby, the Court’s rationale was based on the

⁸⁸At the same time, the CJEU insisted on the conceptual familiarity of the principle of Member State liability with the principle of non-contractual liability of the Community according to Article 288(2) EC. See C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 27-28 and 41-42. In a similar vein, JEAN MISCHO, “L’émergence du principe de la responsabilité de l’Etat” in S. Moreira De Sousa and W. Heusel (eds.), *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle* (Köln, Bundesanzeiger Verlagsges.mmbH., 2004), p. 56; PAUL CRAIG and GRÁINNE DE BÚRCA, *EU Law: Text, Cases and Materials* (Oxford, Oxford University Press, 2003), p. 262; BERNHARD HOFSTÖTTER, *Non-compliance of national courts: Remedies in European Community law and beyond* (The Hague, TMC Asser, 2005), pp. 79 *et seq.*

⁸⁹ The contended national laws in this case were the German *Biersteuergesetz* of 14 March 1952 (Law on Beer Duty, BGBl. I, p. 149), in the version dated 14 December 1976 (BGBl. I, p. 3341) on the one hand and the UK Merchant Shipping Act 1988 on the other.

⁹⁰ C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 51-58.

⁹¹ TAKIS TRIDIMAS, “State Liability for Judicial Acts: Remedies Unlimited?” in P. Demaret *et al.* (eds.), *30 Years of European Legal Studies at the College of Europe, Liber Professorum 1973-74 - 2003-04* (Brussels, Peter Lang, 2005), p. 149.

⁹² Case C-302/97, *Konle*, *supra* note 7, para. 62 (emphasis added); see also C-46 & 48/93, *Brasserie*, *supra* note 4, para. 32.

⁹³ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 34.

understanding of State responsibility under general international law with respect to the question of attribution, whereby an unlawful act is necessarily attributed to the State and not to the State organ, which committed it.⁹⁴ This so-called unitary concept of the State, which allocates acts by all State organs, including the judiciary, to the State as a whole, eventually also played a decisive role in the *Köbler* case. In fact, only shortly after *Brasserie du Pêcheur/Factortame*, and in line with its earlier ruling, the Court found that the *Francovich*-line of cases applied when the violation of Community law was attributable to the administrative authorities of a Member State.⁹⁵

While in subsequent decisions such as *British Telecommunications*,⁹⁶ *Dillenkofer*,⁹⁷ *Denkavit*,⁹⁸ and *Rechberger*⁹⁹ the Court further clarified and refined the scope and content of the application of Member State liability, each violation of Community law in these cases had been committed either by the national legislature or the administrative authorities of a Member State. The Court had never expressly ruled on the question of whether a Member State could also be liable for breaches of EC law attributable to the national judiciary. Amid growing speculation and scholarly attention to the issue,¹⁰⁰ the Court of Justice of the EU finally provided the long-awaited answer to this question in *Köbler*.

⁹⁴ Article 4(1) of the *Draft Articles on Responsibility of States for internationally wrongful acts* as adopted by the International Law Commission (See FN 34). In this context see IAN B. LEE, "In Search of a Theory of State Liability in the European Union" (1999) *Harvard Jean Monnet Working Paper* 9, available at www.jeanmonnetprogram.org/papers/99/990901.html.

⁹⁵ C-5/94, *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.* [1996] ECR I-02553.

⁹⁶ Case C-392/93, *The Queen v. H. M. Treasury, ex parte British Telecommunications plc.*, [1996] ECR I-01631.

⁹⁷ Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v. Bundesrepublik Deutschland* [1996] ECR I-4845.

⁹⁸ Joined cases C-283/94, C-291/94 & C-292/94, *Denkavit International BV, VITIC Amsterdam BV and Voormeer BV v. Bundesamt für Finanzen*, [1996] ECR I-5063.

⁹⁹ Case C-140/97, *Walter Rechberger, Renate Greindl, Hermann Hofmeister and others v. Republik Österreich* [1999] ECR I-03499. For an comprehensive overview of the CJEU's early case-law after *Francovich* see, *inter alia*, AMI BARAV, "State Liability in Damages for Breach of Community Law in the National Courts" (1996) 16 *Yearbook of European Law*, pp. 88 *et seq.*

¹⁰⁰ See, *inter alia*, FERNAND SCHOCKWEILER *et al.*, "Le régime de la responsabilité extra-contractuelle du fait d'actes juridiques dans la Communauté européenne" (1990) *Revue Trimestrielle de Droit Européen* 26, pp. 27; HELEN TONER, "Thinking the Unthinkable, State Liability for Judicial Acts after *Factortame* (III)" (1997) 17 *Yearbook of European Law*, p. 165; GEORGIOS ANAGNOSTARAS, "The

In *Köbler* the CJEU expressly confirmed that the application of the traditional concept of Member State liability also included violations of EC law committed by a national court adjudicating at last instance.¹⁰¹ The CJEU declared that as a matter of principle there was no exception to the general concept of Member State liability for acts violating Community law simply because the breach was attributable to the national judiciary¹⁰² Furthermore, the Court stated that:

[i]n the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.¹⁰³

In her contribution to what could be called a '*Festschrift*' entitled "Enforcing Community Law from *Francovich* to *Köbler*", which was published following a colloquium held by the Academy of European Law in 2001 in honour of the tenth anniversary of the *Francovich* case, Pekka Aalto subscribed to the idea that the principle of Member State liability on the Community level was established in two successive phases. She argued accordingly that the first period was initiated with the CJEU's landmark ruling in *Francovich*, whereas the second stage was heralded by the Court's judgment in *Brasserie du Pêcheur/Facortame*. Continuing Aalto's time-line,

principle of state liability for judicial breaches: The impact of European Community law" (2001) 7 *European Public Law* 2, pp. 281 *et seq.*

¹⁰¹ C-224/01, *Köbler*, *supra* note 1, para. 34.

¹⁰² *Ibid*, para. 34. In this context see, *inter alia*, CLAUS DIETER CLASSEN, "Case C-224/01, *Gerhard Köbler v. Republik Österreich*, Judgment of 30 September 2003, Full Court" (2004) 41 *CML Rev.* 3, pp. 815 *et seq.*; CARSTEN KREMER, "Staatshaftung für Verstöße gegen Gemeinschaftsrecht durch letztinstanzliche Gerichte" (2004) *Neue Juristische Wochenschrift* 8, pp. 480 *et seq.* and DENYS SIMON, "Consolidation de la responsabilité des États membres du fait des violations imputables aux juridictions nationales" (2006) *Europe* 8, pp. 9 *et seq.*

¹⁰³ C-224/01, *Köbler*, *supra* note 1, para. 33.

we argue that the *Köbler* case opened up a new era, a third stage, in the continuing development of the *Francovich*-line.¹⁰⁴

b) The conditions of liability

After confirming in general terms the existence of the principle of Member State liability for breaches of EC law by a national supreme court in the first part of the *Köbler* judgment, the CJEU went on to present the conditions that were intrinsically tied to the invocation of a Member State's liability for judicial violations of Community law.¹⁰⁵ In doing so, the Court adhered, in principle, to the traditional threefold test, which it had established in its longstanding case-line on the question of Member State liability. Similar to the principle itself, the conditions of its application have also over time been gradually developed and refined in the Court's jurisprudence.¹⁰⁶ The different requirements set up by the CJEU in its case-law ever since *Francovich* eventually crystallized into three basic core conditions, with which the Court demanded absolute compliance. In order to invoke a Member State's liability, first, the rule of law infringed had to be intended to confer rights on individuals; secondly, the breach of Community law had to be sufficiently serious; and last but not least, it had to be possible to establish a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties.¹⁰⁷

¹⁰⁴ PEKKA AALTO, "Twelve Years of *Francovich* in the European Court of Justice: A Survey of the Case-law on the Interpretation of the Three Conditions of Liability" in S. M. D. Sousa and W. Heusel (eds.), *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle* (Köln, Bundesanzeiger Verlagsges.mH., 2004), pp. 61 *et seq.*

¹⁰⁵ C-224/01, *Köbler*, *supra* note 1, paras. 51 *et seq.*

¹⁰⁶ See, for example, Case C-424/97, *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-05123, para. 36.

¹⁰⁷ As in *Ibid.*, para. 36 compared to the conditions set up by the Court in C-224/01, *Köbler*, *supra* note 1, paras. 51-52. For a more elaborate analysis of the conditions of liability and their gradual development over time see, for example, JEREMY LEVER, "Mutual Permeation of Community and National Tort Rules: Essays in Honour of Walter Van Gerven" in J. Wouters *et al.* (eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune* (Antwerpen, Intersentia, 2001), pp. 101 *et seq.* TAKIS TRIDIMAS, "Liability for Breach of Community Law: Growing up and Mellowing down?" in D. Fairgrieve *et al.* (eds.), *Tort Liability of Public Authorities in Comparative Perspective* 2002), pp. 149 *et seq.*; PAUL CRAIG, "Once More Unto the Breach: The Community, the State and Damages Liability" (1997) *L.Q.R.* 113 (Jan), pp. 67 *et seq.*

With reference to the situation in *Köbler*, the Court indicated in its ruling that in case of a violation of Community law by a court adjudicating at last instance, a Member State's liability would in principle be subject to those same long-standing conditions.¹⁰⁸ *Prima facie*, the prerequisites set up in *Köbler* seem to converge with the three core requirements to which the CJEU traditionally adhered in its case-law on the question of Member State liability for breaches of Community law. Yet, after a closer analysis it becomes clear that in *Köbler*, while leaving two of these requirements unaltered, the Court changed one of the conditions with the intention of narrowing the ambit of a Member State's liability in cases of a breach of Community law committed by a national court adjudicating at last instance. Notwithstanding the general affirmation of the applicability of the principle in such cases, the Court nevertheless acknowledged that having regard to the specific nature of the judicial function, the special status attributed to the judiciary within the State apparatus and the importance of the fundamental principle of legal certainty, the traditional requirements of State liability had to be adapted to the special circumstances of the case.¹⁰⁹ Taking these elements into consideration prompted the Court to refine the traditional conditions it had been using in its case-law until then.¹¹⁰

i) The 'manifestness' of the breach

It was the second of the established 'trinity' of requirements that the CJEU modified in the *Köbler* case. As mentioned above, the latter presupposed a "sufficiently serious breach"¹¹¹ of Community law by the public organ responsible for

and THOMAS EILMANSBERGER, "The relationship between rights and remedies in EC law: In search of the missing link" (2004) *CMLR* 41, pp. 1223 *et seq.*

¹⁰⁸ C-224/01, *Köbler*, *supra* note 1, para. 52.

¹⁰⁹ *Ibid.*, para. 53.

¹¹⁰ In a similar vein, MARTEN BREUER, "State Liability for Judicial Wrongs and Community Law: The Case of Gerhard Köbler v Austria" (2004) 29 *European Law Review* 2, p. 247; KREMER, "Staatshaftung...", *supra* note 102, pp. 481-482 and BETTINA SCHÖNDORF-HAUBOLD, "Die Haftung der Mitgliedstaaten für die Verletzung von EG-Recht durch nationale Gerichte" (2006) *JuS* 2, pp. 112 *et seq.*

¹¹¹ See the Court's definition of a 'sufficiently serious breach' in cases such as C-46 & 48/93, *Brasserie*, *supra* note 4, para. 56; see also C-140/97, *Rechberger*, *supra* note 99, paras. 49-52; C-5/94, *Hedley Lomas*, *supra* note 95, para. 28; C-31/92, *Marius Larsy v. Institut National d'Assurances Sociales pour Travailleurs Indépendants* [1993] ECR I-04543, para. 44; C-283/94, C-291/94 & C-

the breach. In *Köbler*, the Court increased the qualification of the breach required in this context by ruling that State liability for a violation of Community law by a national court adjudicating at last instance could only be invoked in the exceptional case that the court in question had “*manifestly infringed the applicable law*”.¹¹² Briefly put, the CJEU introduced a higher threshold in cases of judicial violations of Community law in order to render it more difficult to hold the State liable for harm caused to an individual by an erroneous judicial act, as opposed to those breaches of Community law committed by the legislative or the administrative authorities of a Member State. Seeking to clarify which actions were to amount to a ‘manifest breach’ of Community law, the Court provided a non-exhaustive list in *Köbler* outlining some of the crucial factors to be considered when evaluating a violation of EC law by a national supreme court. Those elements included, *inter alia*,

the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.¹¹³

Moreover, according to the Court, a breach of Community law qualified as being “sufficiently serious where the decision concerned was in manifest breach of the case-law of the Court.”¹¹⁴

After formulating the general conditions of liability to be applied in cases of judicial breaches of Community law, the Court proceeded to an evaluation of the Austrian Supreme Court’s actions, which had eventually substantiated *Köbler*’s claim

292/94, *Denkavit*, *supra* note 98, para. 53 *et al.* In this context, see also AALTO, “Twelve Years of Francovich...,” *supra* note 104, pp. 64-72.

¹¹² C-224/01, *Köbler*, *supra* note 1, para. 53 (emphasis added). In the original German version of the judgment the Court stated that “[d]er Staat haftet für eine solche gemeinschaftsrechtswidrige Entscheidung nur in dem Ausnahmefall, dass das Gericht offenkundig gegen das geltende Recht verstoßen hat.” (emphasis added).

¹¹³ *Ibid*, para. 55.

¹¹⁴ *Ibid*, para. 56.

for damages. In this context, the *Landesgericht für Zivilrechtssachen Wien* had asked the CJEU to rule on the question as to whether, under consideration of all the facts in the case, the conditions necessary to invoke the liability of the Austrian State were fulfilled.¹¹⁵ With reference to the newly-established second requirement in this context, the Court commented on the degree of ‘seriousness’ or ‘manifestness’ of the Austrian Supreme Court’s failure to uphold its request for a preliminary ruling under Article 234(3) EC and the resulting infringement of Community law in the *VwGH*’s final judgment. It declared that it was due to the *VwGH*’s “incorrect reading” of the *Schöning-Kougebetopoulou* judgment that the *VwGH* had no longer considered it necessary to maintain its preliminary reference to the CJEU.¹¹⁶ However, the CJEU concluded that even though the withdrawal of the request for a preliminary ruling by the *VwGH* had constituted an undeniable infringement of Community law, in considering all the circumstances of the case, the breach was not manifest enough so as to justify the incurrence of State liability.¹¹⁷ As a result, by a cruel stroke of irony, Mr. Köbler was not entitled to receive any compensation.

ii) The conditions for liability: Advocate General Léger’s Opinion

With respect to the conditions applicable in liability cases involving erroneous judicial acts, the responsible Advocate General in the *Köbler* case, Philippe Léger, had suggested a slightly different approach in his Opinion, which was eventually not entirely followed by the CJEU and also led to a different outcome in Léger’s conclusions. Nevertheless, on the essential points of the case regarding the extension of the *Francovich*-doctrine to judicial breaches of EC law, the Advocate General and the Court both agreed that the Member States were obliged to compensate for the loss or damage caused to individuals as a result of a breach of Community law, even if

¹¹⁵ That request in itself was already rather extraordinary as the CJEU’s policy in liability cases has been to allow national courts to decide, as much as possible, since they are best situated to apply criteria for liability to the facts of the case before them.

¹¹⁶ C-224/01, *Köbler*, *supra* note 1, para. 116.

¹¹⁷ *Ibid*, para. 124.

that breach stemmed from a decision of a national court adjudicating at last instance.¹¹⁸

Despite the basic consensus on the principle *per se*, the Court's final ruling was also in line with the Advocate General's Opinion regarding the basic substantive conditions for Member State liability for judicial breaches.¹¹⁹ Both the CJEU and Léger expressed the view that the traditional core conditions governing Member State liability under Community law had to be modified and adjusted to the particular circumstances of the case. Similar to the CJEU's reasoning in its final judgment, where the Court had resorted to the classical framework conditions of the *Francovich*-line (albeit in a slightly modified form), Advocate General Léger also argued for the application of more stringent conditions in cases where the harm had been caused by an erroneous judicial act.¹²⁰ Furthermore, agreement remained on the need to adjust the second of the traditional *Francovich*-criteria.¹²¹ Likewise, Léger referred to the special status of the judiciary and the fundamental principles of legal certainty, the independence of the judiciary and the respect for the maxim of *res judicata*, all of which had to be taken into account in this case.¹²² Accordingly, the Advocate General also underlined the need to adapt the *Francovich*-test in *Köbler*-type cases of Member State liability.¹²³ Thus, the Advocate General and the Court fully agreed that State liability for breaches of Community law by a national supreme court adjudicating at last instance could only be invoked in the exceptional case of a *manifest* infringement of the applicable law.¹²⁴

Notwithstanding the agreement on these general points, *Köbler* belongs to the exceptional group of cases, in which the CJEU did not fully follow the Advocate

¹¹⁸ Opinion, Advocate General Léger in *Ibid*, para. 36.

¹¹⁹ Opinion, Advocate General Léger in *Ibid*, para. 158.

¹²⁰ Opinion, Advocate General Léger, *Ibid*, paras. 130-144.

¹²¹ *Ibid*, paras. 138-154.

¹²² *Ibid*, paras. 96 *et seq.*

¹²³ *Ibid*, paras. 87-114.

¹²⁴ *Ibid*, para. 139.

General's Opinion.¹²⁵ The point of contention between the Court and Léger arose over the precise definition of the required 'manifest breach' of Community law. Contrary to the Court of Justice, which listed a number of elements and criteria applicable to qualify an infringement as manifest, the Advocate General expressly argued that the decisive element in the classification of an error of the judiciary as manifest, was the question of whether the breach was *excusable*.¹²⁶ Even though the CJEU had also explicitly referred to the element of excusableness of a breach in its list of criteria of possible indicators of a manifest breach in *Köbler*, Léger put a much stronger emphasis on the element of the excusableness and rendered it the decisive factor in his assessment of the "manifestness" of a judicial breach.¹²⁷ The different approach in the Advocate General's Opinion eventually also led to a different final outcome in *Köbler*. Unlike the CJEU, the Advocate General argued that the *VwGH* had in fact committed an inexcusable and therefore manifest infringement of Community law by withdrawing its request for a preliminary ruling and consequently, by dismissing Mr. Köbler's application.¹²⁸ Hence, according to the Advocate General's Opinion, Austria would have needed to compensate Mr. Köbler for the damage he had sustained as a result of the Austrian Supreme Court's manifest breach of Community law.¹²⁹ Compared to Léger's conclusions, the CJEU was more lenient towards the Austrian *Verwaltungsgerichtshof* in its final ruling.

c) Critical assessment and unresolved questions

The key points of contention regarding the Court's *Köbler* ruling are quite obvious in the sense that they have not only been addressed by several Member States already in their observations to the Court in *Köbler*, but have also been addressed in the Advocate General's Opinion, as well as the Court's final judgment. Moreover, they have been repeated numerous times in the doctrine. The three crucial objections

¹²⁵ BREUER, "State Liability...", *supra* note 110, p. 243.

¹²⁶ C-224/01, *Köbler*, *supra* note 1, paras. 139-154.

¹²⁷ Opinion, Advocate General Léger, *Ibid*, para. 139.

¹²⁸ Opinion, Advocate General Léger, *Ibid*, para. 174. See also CEES VAN DAM, *European Tort Law* (Oxford, Oxford University Press, 2006), pp. 206 *et seq.*

¹²⁹ C-224/01, *Köbler*, *supra* note 1, para. 174.

to the application of the *Köbler* principle were essentially first, the independence and the authority of the judiciary; secondly, the principle of legal certainty and thirdly, the absence of a court competent to determine disputes of State liability for judicial breaches under national law.¹³⁰ It is precisely these three arguments that are used most frequently to criticize the Court's approach. While we will address each of these contentious points in due course, there are a few reflections and comments left to be made beforehand on the Court's ruling itself.

i) The mystery of manifestness

Overall, the CJEU was very clear in confirming that under the extended *Francovich*-doctrine judicial violations of Community law could also trigger the liability of a Member State. However, when it came to outlining requirements that had to be fulfilled in each case, the Court provided a rather vague account of the newly-introduced prerequisite of a 'manifest' breach. In fact, when looking at the set of possible elements which the Court listed in paragraph 55 of its ruling and which could, according to it, potentially account for a manifest breach of Community law, a direct comparison with a similar list included in the *Brasserie du Pêcheur/Factortame* judgment in order to clarify the meaning of a "sufficiently serious breach",¹³¹ indicates that except for one additional factor added to the list in *Köbler*, the exact same criteria had been previously used by the Court as the decisive test to determine whether in the case of liability induced by national authorities the Member State "manifestly and gravely disregarded the limits on its discretion".¹³² The additional criterion to be considered in *Köbler*-like cases was the "non-compliance by the court in question with its obligation to make reference for a preliminary ruling under Art.

¹³⁰ Already in 1997, long before the *Köbler* judgment, Helen Toner listed these reasons as arguments against extending Member State liability to judicial breaches. See TONER, "Thinking the Unthinkable...", *supra* note 100, pp. 179 *et seq.*

¹³¹ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 56.

¹³² *Ibid.*, para. 55. Very critical on this point PEDRO CABRAL and MARIANA CHAVES, "Member State Liability for Decisions of National Courts Adjudicating at Last Instance: Case C-224/01, Gerhard Köbler v. Republik Österreich" (2006) 13 *Maastricht Journal of European and Comparative Law* 1, p. 119 *et seq.*

234 EC par. 3.”¹³³ The fact that the Court had already introduced the requirement of a ‘manifest’ breach in the context of Community-law violations by national authorities enjoying wide discretion is undoubtedly rather confusing. In *Brasserie du Pêcheur/Factortame* the Court required a ‘manifest and grave’ disregard of discretion; *Köbler*, however, only calls for a ‘manifest’ breach.

But not a ‘grave’ one? While it is clear that the Court surely did not want to introduce less stringent conditions for judicial breaches as opposed to those applicable to violations by public authorities acting with wide discretion, the Court’s terminological choice in *Köbler* is rather unfortunate. In addition, the fact that the CJEU did not follow-up with a clear and unambiguous definition of the required degree or qualification of the breach leaves a lot of questions unanswered. Moreover, in light of the fact that in the eyes of the CJEU the breach by the Austrian Supreme Administrative Court was not manifest enough to incur the liability of the State, renders it rather difficult to imagine a breach which would in fact meet this test. Even the CJEU’s well-known follow-up ruling in *Traghetti*, which could have served as an opportunity for the Court to clarify some of the unresolved issues, did not shed more light on the definition of ‘manifestness.’ Instead, in this case the Court simply directly referred to paragraphs 53 to 55 of the *Köbler* ruling, which contain the list of criteria to be applied in such a case.¹³⁴

In this context one additional aspect should, however, be considered which might provide if not an explanation then at least speculation on what could have influenced the Court’s decision in *Köbler*. What remained (at least in the wording of the judgment) entirely outside of the CJEU’s considerations was the role played by the Court’s Registrar in this particular case. After all, the Austrian *VwGH* had only withdrawn its preliminary reference after having received the notification from the Court’s Registrar asking whether in light of the CJEU’s ruling in the case *Schöning-Kougebetopoulou* the *VwGH* still “deemed it necessary” to maintain its reference to

¹³³ C-224/01, *Köbler*, *supra* note 1, para. 55.

¹³⁴ Case C-173/03, *Traghetti del Mediterraneo SpA, in liquidation v. Repubblica italiana* [2006] ECR I-05177, see especially paras. 32 and 43.

the Court.¹³⁵ Considering the fact that the Registrar had quite evidently misjudged the situation in his notification to the Austrian Court to reconsider its earlier reference under Article 234(3) EC gives us reason to consider to what extent the CJEU itself might carry a certain degree of fault in the *VwGH*'s handling of the case. The CJEU is conspicuous in its silence on the matter in the final *Köbler* ruling and so it remains nothing more than speculation to suggest that this might explain the Court's leniency towards the Austrian *Verwaltungsgerichtshof* when qualifying its breach of EC law as not manifest enough to invoke the State's liability.¹³⁶ Moreover, it would surely be rather difficult in practice to establish the causal link between the Registrar's notification to the *VwGH* – despite the remaining questionable situation under Community law – and the *VwGH*'s subsequent breach of EC law in its final ruling in the case.

In sum, after the CJEU's general confirmation of the principle of Member State liability for judicial breaches of Community law, the Court's emphasis on the required 'manifestness' of the breach in this context was the other real novelty introduced by the *Köbler* judgment. Nevertheless, in its final ruling the CJEU missed out on defining the precise conditions for the application of the *Köbler* doctrine, especially with respect to the newly-established requirement of a manifest breach.

ii) The eternal struggle with non-compliant supreme courts

As noted above, the CJEU had added one additional element to its list of factors contributing to the qualification of a violation of EC law as manifest. This was a court of last instance's violation of its duty to make a preliminary reference to the Court according to Article 234(3) EC.¹³⁷ With respect to this last element, however, the Court had not made it entirely clear in the *Köbler* ruling whether the breach of the duty to refer questions for a preliminary ruling only amounted to a manifest breach in

¹³⁵ The facts, but not the implications of this event are mentioned in C-224/01, *Köbler*, *supra* note 1, para. 8.

¹³⁶ A similar argument was raised by CLASSEN, "Case C-224/01...", *supra* note 102, p. 819.

¹³⁷ C-224/01, *Köbler*, *supra* note 1, para. 55.

combination with other factors or whether the breach of Article 234(3) EC constituted a self-standing violation that would in itself be sufficient to invoke a Member State's liability. While the Advocate General had clearly stated in his Opinion that the violation of a court of last instance's duty to make a reference to the CJEU according to Article 234(3) EC was an inexcusable error in itself that would impose liability,¹³⁸ the Court only mentioned the violation of Article 234(3) EC as one factors among others that should be taken into consideration in the assessment of whether the national court's violation amounted to a manifest breach.¹³⁹ In addition to the Advocate General also the European Commission's observations in the case had also argued for the application of the *Francovich*-doctrine to cases of violations of Article 234(3).¹⁴⁰ The specific weight that should be attributed to a breach of Article 234(3) EC in the overall evaluation of a national court's breach was not specified any further by the CJEU.¹⁴¹

iii) Courts or merely courts of last instance?

There was one last point which was not immediately clear from the Court's reasoning in the case. With the explicit confirmation of an extended *Francovich*-doctrine that also embraced judicial violations of Community law, in *Köbler*, did the Court extend the individual's right to reparation to all judicial breaches of Community law or only to those violations committed by courts adjudicating at last instance? While the *Köbler* case obviously dealt with a breach incurred by a court of last instance, the Austrian Supreme Administrative Court, it was nevertheless not made explicit in the Court's reasoning that the *Köbler* principle would not be applicable violations of Community law by lower national courts.

¹³⁸ Opinion, Advocate General Léger in *Ibid*, para. 148: "In those circumstances, it is logical and reasonable to consider that manifest breach by a supreme court of an obligation to make a reference for a preliminary ruling is, in itself, capable of giving rise to State liability."

¹³⁹ *Ibid*, paras. 55 and 174.

¹⁴⁰ Opinion Advocate General Léger, *Ibid*, para. 119.

¹⁴¹ The criteria determining a national court of last instance's duty to make a reference for a preliminary ruling according to Article 267(3) TFEU are outlined in detail in the CJEU's case-law. A leading case in this respect was the Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 03415. We will return to this question in more detail in chapter V of the thesis.

However, this appears to be the case. This is at least what can be deduced from the CJEU's established case-law on the question of national procedural autonomy. As the CJEU had already ruled in *Francovich*, while the right to reparation for damage incurred through a breach of EC law was a principle "inherent in the system of the Treaty" and hence, an autonomous remedy,¹⁴² the Court has repeatedly underlined that

[i]n the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law.¹⁴³

However, the Member State's procedural and substantive autonomy was not unlimited and indeed immediately relativised by the CJEU with the well-known principles of effectiveness and equivalence.¹⁴⁴ Thereby, the requirements imposed on the Member States were that the applicable national rules guaranteeing the individual's right to reparation under Community law must first, "not be less favourable than those relating to similar domestic claims" and secondly, "must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation".¹⁴⁵ In this context, the Court, however, also stated early on that a provision under national law requiring the harmed individual to resort first to the legal remedies open to him/her in the national courts before invoking a liability claim was not necessarily contrary to Community law. In fact, with respect to the widespread principle of primacy of appellate review, the Court clearly stated that

¹⁴² C-6 & 9/90, *Francovich*, *supra* note 2, para. 35.

¹⁴³ *Ibid*, para. 42. In this context see, *inter alia*, Joined Cases C-392/04 and C-422/04, *i-21 Germany GmbH and Arcor AG & Co. KG, formerly ISIS Multimedia Net GmbH & Co. KG v. Bundesrepublik Deutschland* [2006] ECR I-8859, para. 57; as well as Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 01989 and Case 158/80, *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v. Hauptzollamt Kiel* [1981] ECR 01805.

¹⁴⁴ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 67.

¹⁴⁵ C-6 & 9/90, *Francovich*, *supra* note 2, para. 43.

it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself.”¹⁴⁶

Therefore, once again relying on a ‘common principle’, the CJEU also subscribed to the idea that the individual has to show diligence in avoiding loss or at least in limiting its extent before resorting to an action in damages. In essence, the individual is therefore only compensated for harm that he could not prevent. According to the CJEU, this included a situation whereby the loss might have been avoided or at least limited, had the individual availed himself of adequate legal remedies open to him under national law. Briefly put, the Court approved of the principle of the primacy of appellate review, as long as it was in line with the principle of effectiveness, meaning that it did not render it impossible for the individual to obtain reparation. Hence, a principle such as the primacy of appellate review, which apparently exists in most EU Member States,¹⁴⁷ will preclude a situation whereby an individual can resort to a State liability claim before having lodged an appeal to the next instance court.¹⁴⁸

Last but not least, it seems to be fully in line with the Court’s application of the unitary concept of the State as it exists under international law and its confirmation as a principle that “must apply *a fortiori* in the Community legal order”¹⁴⁹ that the rule

¹⁴⁶ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 85.

¹⁴⁷ Chapter VI of our study will actually give an overview of all the Member States that recognize such a principle under national law. Thus, we will be revisiting this issue in more detail again at a later point.

¹⁴⁸ In a similar vein, TRIDIMAS, “State Liability...,” *supra* note 91, p. 158 and PETER SCHWARZENEGGER, “Die Subsidiarität des Haftungsanspruchs; Die Ausschöpfung des Rechtswegs als Voraussetzung der Geltendmachung von Haftungsansprüchen und das Verhältnis von Haftungs- und Erstattungsansprüchen” in M. Holoubek and M. Lang (eds.), *Organhaftung und Staatshaftung in Steuersachen* (Wien, Linde Verlag, 2002), pp. 357 *et seq.* See also ROBERT REBHACH, “Staatshaftung nach dem Recht der Europäischen Gemeinschaft” (1996) 118 *JBl* 12, p. 758

¹⁴⁹ C-224/01, *Köbler*, *supra* note 1, para. 32.

of prior exhaustion of local remedies is as much a feature of EC law in this case as it is a ‘categorical imperative’ under customary international law.¹⁵⁰

d) Revealing commonalities or calling for the national bugbears?

The *Köbler* case triggered critical reactions not only in the Member States’ observations during the proceedings in front of the CJEU,¹⁵¹ but also immediately after the Court had issued its ruling. *Köbler* was received with little enthusiasm in the academic legal literature and even less praise were few. On the contrary, the judgment provoked rather puzzled reactions in scholarly writing and some voices of discontent even came from members of national supreme courts. Peter Wattel, Advocate General in the Netherlands’ Supreme Court, rather ironically commented on the CJEU’s decision in *Köbler* by reminding the Court that “[t]hose who live in glass houses should not throw stones.”¹⁵²

When faced with such critical reactions and the defence of such fundamental issues like the authority of the principle of *res judicata*, legal certainty and the intangible maxim of judicial independence by some commentators, the question inevitably arises if what the Court established in *Köbler* is really reflected in the national legal orders of the Member States? In essence, to return to the question we raised in our introductory comments, how could something so “common” be at the same time so divisive? According to the CJEU the concept of State liability for judicial breaches established in *Köbler* had been built on principles “generally acknowledged”¹⁵³ in the laws of the (then) fifteen Member States. What are these

¹⁵⁰ See, for example, *Case Concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989, ICJ Reports 1989, p. 15; Article 41(1)(c) of the International Covenant on Civil and Political Rights; Article 35(1) of the European Convention on Human Rights (“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken”); and Article 46.1 of the American Convention on Human Rights.

¹⁵¹ C-224/01, *Köbler*, *supra* note 1, paras. 16-29.

¹⁵² PETER J. WATTEL, “Köbler, Cilfit and Welthgrove: We can’t go on meeting like this” (2004) *CML Rev.* 41, p. 184.

¹⁵³ Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 82.

general principles that inspired and guided the Court in the establishment of such a concept on the Community level?

In search of an answer to these questions, it is through the principle of national procedural autonomy that we will gain access to the various systems of State liability in the Member States. As noted above, in its *Francovich* judgment the Court had already delegated to the Member States the power to determine the substantive and procedural conditions under national law in order to safeguard the rights that individuals derive from Community law. Thereby, the Court had declared that “it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused.”¹⁵⁴ Consequently, the remedy of reparation is purely a matter of national law.¹⁵⁵ A comparison of the liability standards under national law of each Member State with those required by Community law is therefore indispensable in order to ensure that the remedial framework under national law corresponds with the CJEU’s requirements enshrined in the twin principles of effectiveness and equivalence. Accordingly, through the direct comparison of the *Köbler* principle with the corresponding regime under national law, the commonalities that so heavily influenced the CJEU’s reasoning in the case should also become obvious. The principle of national procedural autonomy will be the ‘lodestar’ in guiding us through the national legal systems of State liability for judicial breaches. According to Advocate General Léger this should be a fairly easy task as, with the exception of Ireland, “all the Member States accept the principle of State liability for judicial acts”.¹⁵⁶ In this spirit and in search for commonalities our comparative journey can begin.

¹⁵⁴ C-6 & 9/90, *Francovich*, *supra* note 2, para. 42.

¹⁵⁵ GEORGIOS ANAGNOSTARAS, “The allocation of responsibility in State liability actions for breach of Community law: A modern gordian knot?” (2001) 26 *ELR* 2, p. 153.

¹⁵⁶ Opinion, Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 77.

PART II

The principle of Member State liability for judicial breaches under national law

CHAPTER II.

COMPARATIVE METHODOLOGY

I. Preliminary remarks on basic aims and methodology

While there are many virtues to comparative law the main aim of contemporary comparative law is the systematization of different legal orders and legal systems.¹⁵⁷

¹⁵⁷ MARKKU KIIKERI, *Comparative Legal Reasoning and European Law* (Dordbrecht/Boston/London, Kluwer Academic Publishers, 2001), p. 2.

1. Questions of terminology and the delimitation of the object of study

Following the presentation of our subject of study in the introductory paragraphs and the formulation of those questions which we will seek to answer in the course of it, we are now concerned with the scope of our comparative project. This is even more so, given the width of our topic and need to define precisely the focus of our primary research question.

In this context, it is first of all vital to clarify the terminology we are going to employ in the course of our work. With reference to remedial claims for damages caused in the exercise of a judicial function, there are a number of concepts which will be used throughout our comparative analysis into different legal and national contexts. Apart from problems of translation, which are unavoidable when conducting a comparative legal study that covers 23 different working languages,¹⁵⁸ one of the most significant hurdles to overcome in the course of a comparative exercise is the preliminary task of defining the parameters of that study.¹⁵⁹ Without the definition of clear and uniform parameters at the very outset, any comparative assertion that follows will be tainted. By defining the terminology and the concepts we are going to employ in the course of this study, we seek to provide a clear and precise definition of those basic parameters which will serve as the foundation for our comparative analysis. On the terminological side, if we ask for the definition of a judicial act and the concept of judicial responsibility, different people from different Member States will present us with different answers. Accordingly, we will need to clarify upfront what we understand by the notion of a 'judicial act' and what meaning we attribute to judicial responsibility.

¹⁵⁸ <http://europa.eu/languages/en/chapter/5>.

¹⁵⁹ So also BUSSANI and PALMER, "The liability...", *supra* note 47, pp. 166 *et seq.*

a) Problems of terminology

“Legal terms in any language take their coloration and meaning in considerable measure from the legal systems in which they are used.”¹⁶⁰ The validity of this statement by Schlesinger has been proven right many times throughout this analysis. Already in the course of the current delimitation exercise, we will encounter a number of challenges in that respect. The key problems we faced in the current study were different terminological hurdles, which rendered it rather challenging at times to find a common denominator for our basic parameters. First of all, differences in the conceptualization of the State¹⁶¹ among certain Member States have created some difficulties of comparison. It is, for example, not easy to delimit a study on State liability in English law, where there is, in fact, no precise legal definition of the State.¹⁶² These differences also explain the diversity of terms which are generally used interchangeably to refer to the concept of State liability in England, such as ‘governmental liability’ or ‘Crown liability’. In France, on the other hand, the concept of the State has been analysed and debated over centuries, in an attempt to define the contours of the scope of administrative liability.¹⁶³

The French system, however, poses different delimitational problems, which stem from the jurisdictional complexities of the civil and administrative court system in France. The principle of strict separation of courts has led to the development of two different liability regimes and we are therefore faced with the complex situation of State liability for violations by the *justice judiciaire* on the one hand, and harm committed by an act of the *justice administrative* on the other. Even though the majority of State liability claims fall within the purview of the administrative law courts, the ordinary courts in France have gained jurisdiction in certain cases, *inter*

¹⁶⁰ RUDOLPH SCHLESINGER, "The Past and Future of Comparative Law" (1995) *AJCL* 43, pp. 477 *et seq.*

¹⁶¹ For a detailed discussion on this topic see KENNETH H.F. DYSON, *The State Tradition in Western Europe: A Study of an Idea and Institution* (Oxford, Martin Robertson, 1980).

¹⁶² CAROL HARLOW and RICHARD RAWLINGS, *Law and Administration*, 2nd ed. (London/Charlottesville, Va., Butterworths, 1997), p. 1.

¹⁶³ MARIE-AIMÉE DE LATOURNERIE, "The Law of France" in J. Bell and A. W. Bradley (eds.), *Governmental liability: A comparative study* (London, British Institute of International and Comparative Law, 1991), p. 202.

alia concerning the activities of the judicial organs (*justice judiciaire*). Thereby, the civil courts apply the concept and the rules of *responsabilité administrative*. All that creates the rather complex picture of public liability in France.

b) The concept of a judicial act

The concept of a judicial act is certainly not easy to define either as it tends to have different meanings and interpretations in different Member States. Moreover, it is obvious that judges and court officials involved in the judicial process perform a number of different functions. Does the concept of a judicial act only include acts of a judicial nature? Or does it also embrace acts of an administrative or ministerial nature, i.e. any act involving no exercise of judgment and discretion, since they are undoubtedly also a vital part of every judicial process? To avoid a conflict between the various interpretations and in order to arrive at a uniform and autonomous definition which will be used throughout this study, we will resort to the long-standing definition of a judicial act by Velu, which he established as early as 1985 in his commentary on the Council of Europe's Recommendation No. R (84) 15 on Public Liability.¹⁶⁴ The Recommendation itself had failed to come up with a single autonomous definition of 'a judicial act' and instead simply referred to the respective definitions used under the domestic law of each State. Critical of the Recommendation's lack of precision regarding the meaning attributed to a judicial act, Velu established a broad, but sufficiently concise definition of the concept at the occasion of the XVth Colloquy on European Law in Bordeaux. In his report, which was later published in a collection of essays by the Council of Europe,¹⁶⁵ Velu draws upon two basic elements which are, in his understanding, crucial to the definition of a 'judicial act'. First, he stipulates that the concept of an "act" includes any form of conduct, be it an action or omission, producing direct effects on a person's rights,

¹⁶⁴ The Recommendation was subsequently adopted by the Committee of Ministers of the Council of Europe on 18 September 1984. See H. J. BRONKHORST, "The Valid Legislative Act as a Cause of Liability of the Communities" in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law* (The Hague/London/Boston, Kluwer Law International, 1997), pp. 158 *et seq.*

¹⁶⁵ J. VELU, "Essential Elements for a Legal Regime Governing Public Liability for Judicial Acts", *Proceedings of the XVth Colloquy on European Law: Judicial Power and Public Liability for Judicial Acts, 17-19 June 1985* (Bordeaux, Council of Europe, 1986).

freedoms or interests.¹⁶⁶ Secondly, a “judicial act” is to be interpreted as embracing “any act carried out in the administration of justice which was performed in the exercise of a judicial function.”¹⁶⁷

With respect to the second element and the terminology employed in this context, Velu subsequently distinguishes between two different categories of judicial acts. In line with the Council of Europe’s explanatory memorandum to the Recommendation on Public Liability, Velu further clarifies that a judicial act not only refers to the act of “giving a judgment in contentious proceedings”, but also embraces “any function exercised either by members of the legal service or on their behalf or under their responsibility, supervision or direction with the object of contributing to the establishment or execution of such judgments.”¹⁶⁸ This also concerns matters such as the organization and the smooth functioning of the judicial apparatus. It is crucial for the delimitation of our study to take into account these two different concepts as melded together in the definition of a judicial act. A similar distinction is usually drawn under national law like, for example, in the United Kingdom where officers of courts of justice generally act either judicially or ministerially; or in France, where a distinction is usually drawn between an ‘*acte administrative*’ on the one hand and an ‘*acte juridictionnel*’ on the other.¹⁶⁹ However, this distinction is not always as clear-cut. Especially when looking at the daily judicial practice, it can at times be fairly problematic to distinguish clearly between judicial acts pertaining to the administration of justice on the one hand and acts performed in the course of contentious court proceedings on the other.

The United Kingdom is a particularly good example for a legal system, in which it is fairly difficult to draw a clear line of demarcation between judicial acts and so-

¹⁶⁶ Ibid, p. 80.

¹⁶⁷ Ibid, p. 80. See also the text and the relevant explanatory memorandum of this Recommendation and its Appendix in the brochure entitled “Public Liability”, published in 1985 by the Legal Affairs Directorate of the Council of Europe.

¹⁶⁸ Ibid, p. 80.

¹⁶⁹ ANNA OHLENBURG, *Die Haftung für Fehlverhalten von Richtern und Staatsanwälten im deutschen, englischen und französischen Recht* (Osnabrück, Universitätsverlag Rasch, 2000), p. 67.

called ministerial acts. This even more so, as neither the courts nor the literature have come up with a uniform definition of what constitutes a judicial as opposed to a ministerial act.¹⁷⁰ In a similar vein, Robson stated early on that “[t]here does not appear to be any conclusive test by means of which judicial activities can be infallibly distinguished from administrative activities, very largely because there is no dividing line between the two.”¹⁷¹ In an attempt to clarify the situation under British law, Clerk, amongst others, tried to draw a dividing line between the various acts performed by officers of courts of justice. According to his definition, a ministerial act was one “which the law points out as necessary to be done under the circumstances, without leaving any choice of alternative courses,” adding that “[e]very purely formal step in a legal process, and everything which is necessary to carry into execution what has been judicially decided, is ministerial.”¹⁷² The guiding element which is attached to a judicial act (as opposed to a ministerial act), according to Clerk, is “the exercise of a discretion, in which something has to be heard and decided.”¹⁷³ These latter so-called ‘judicial acts *stricto sensu*’ are generally considered to constitute the heart of the judicial function.¹⁷⁴

According to most national systems, there is also a clear separation between a State’s liability for erroneous judicial acts of an administrative nature and the system of liability applied to judicial acts *stricto sensu*. Based on the results of our survey, when an individual suffers harm as a result of a ministerial judicial act, he or she usually has the possibility to lodge a State liability claim for judicial breaches under much less restrictive conditions than for those judicial violations related to judicial

¹⁷⁰ Ibid, p. 68.

¹⁷¹ As in WILLIAM A. ROBSON, *Justice and Administrative Law: A Study of the British Constitution*, 3rd ed. (Westport, Connecticut, Greenwood Press, 1970), p. 14.

¹⁷² JOHN FREDERIC CLERK, *Clerk & Lindsell on Torts*, 16th ed. (London, Sweet & Maxwell, 1989), p. 1475.

¹⁷³ Ibid, p. 1475.

¹⁷⁴ In Velu’s opinion the decision of whether an act is a judicial act taken in the course of contentious court proceedings as opposed to a judicial act of a purely administrative nature relies on various criteria, which Velu refers to as “factual, organic and formal or procedural criteria”. For further details see VELU, “Essential Elements...,” *supra* note 165, pp. 81 *et seq.*

acts *stricto sensu*. In fact, in cases where the act causing the damage is a judicial act performed during contentious court proceedings, a so-called judicial act *stricto sensu*, we are faced with a number of different national approaches towards public liability. Overall, what all the 27 Member States seem to have in common is the awareness that judicial acts *stricto sensu* constitute an exception, which cannot simply be absorbed by the general regime of State liability.¹⁷⁵ It is this latter type, judicial acts *stricto sensu*, which will be at the focus of our analysis.

c) The different faces of judicial responsibility

The complex correlation between the two concepts of judicial independence and judicial responsibility was perfectly pointed out by Lord Woolf when he noted that “the judiciary’s independence carries with it responsibilities”.¹⁷⁶ Judicial responsibility in itself is already an ambiguous term as it carries both meanings, power and accountability for the application of that power.¹⁷⁷ Accordingly, judicial power entails the exercise of the governmental or State function of adjudication. Since adjudication is another concept whose meaning and definition are to our study, we will base our understanding thereof on the broad definition provided by Shetreet, who split the general notion of adjudication into three different elements, an administrative, a procedural and a substantive element.¹⁷⁸ With reference to this threefold division Shetreet argued that

[j]udges have *administrative responsibility* for managing the cases, fixing dates for their hearing, organizing the judicial workload and expediting the hearing and the resolution of the cases. Judges also have *procedural*

¹⁷⁵ Hereinafter we will use the expression of ‘judicial acts *stricto sensu*’ when referring to judicial acts pertaining to contentious court proceedings.

¹⁷⁶ LORD WOOLF, “Should the Media and the Judiciary be on Speaking Terms?”, (Eighth RTE/UCD Law Faculty Lecture, Dublin, 23 October 2003).

¹⁷⁷ MAURO CAPPELLETTI, “Who Watches the Watchmen? A Comparative Study on Judicial Responsibility” (1983) *The American Journal of Comparative Law* 1, p. 4.

¹⁷⁸ SHIMON SHETREET, “National Report, Israel”, *Proceedings of the XVth Colloquy on European Law: Judicial Power and Public Liability for Judicial Acts, 17-19 June 1985* (Bordeaux, Council of Europe, 1986), § I, p. 1-2.

responsibilities for conducting the trial itself and for regulating the process according to the rules of evidence and procedure. [...] Eventually [...] the judges have to [...] resolve cases. This part of the adjudication, which can be called ‘*substantive*’ *decision making*, involves the determination of the findings of fact and the application of the relevant legal norms to the facts of the case.¹⁷⁹

The question of accountability for the exercise of such power of adjudication in all its forms is a central tenet of our study.

Generally speaking, judicial accountability is a complex legal construct, which involves an objective assessment of the judge’s or the judiciary’s behaviour on various levels and through an array of different mechanisms.¹⁸⁰ In order to clarify the meaning of the concept itself, it is crucial to differentiate between the different forms or types of judicial accountability. First, according to whatever forum is responsible for evaluating the judges’ performance, we can broadly distinguish between political, societal and various forms of legal accountability of judges. Furthermore, according to who is held accountable, we also differentiate between personal and public liability for judicial acts.¹⁸¹ In a similar manner, the different faces of judicial responsibility have also been carefully outlined in a compelling study by Mauro Cappelletti, in which he provided a general topical overview on the question on the basis of 28 national reports, which had previously been presented at the 11th International Congress of the International Academy of Comparative Law, held in Caracas, Venezuela in 1982.¹⁸²

¹⁷⁹ Ibid, § 1, p. 1-2. (emphasis added)

¹⁸⁰ For a detailed definition of the concept of judicial accountability see MADS ANDENAS and DUNCAN FAIRGRIEVE, "Judicial Independence and Accountability: National Traditions and International Standards" in G. Canivet *et al.* (eds.), *Independence, Accountability, and the Judiciary* (London, BIICL, 2006), pp. 23 *et seq.*

¹⁸¹ ANDREW LE SUEUR, "Developing Mechanisms for Judicial Accountability in the UK" in G. Canivet *et al.* (eds.), *Independence, Accountability and the Judiciary* British Institute of International and Comparative Law, pp. 55 *et seq.*

¹⁸² CAPPELLETTI, "Who Watches the Watchmen?...", *supra* note 177, pp. 1-62.

The enormous challenge in presenting a concise and yet comprehensive study on judicial responsibility lies in the breadth of the topic. Not only are we faced with different embodiments of judicial accountability, but beyond that we are also dealing with diverse and subjective perceptions of the concept of responsibility as they prevail in various national systems. In line with Cappelletti's systematization,¹⁸³ we can in fact broadly distinguish between four different types of judicial accountability, out of which most national systems usually adopt three or even four. These are political accountability, societal (or public) accountability, the personal legal accountability of judges and the vicarious legal accountability of the State for the acts of judges. However, prevalence of the one or the other type can certainly be observed in different societies and over different time periods. Therefore, the identifiable differences among national systems also lie in the manner in which legal systems combine the application of various types and sub-types of judicial responsibility.

The first expression of judicial accountability emerging in this context is the process of *political accountability*.¹⁸⁴ This form of judicial liability concerns the responsibility of an individual judge or the judiciary as a group for culpable behaviour during the exercise of judicial duties, but also for specific conduct outside the office. Under English law, for example, judicial misbehaviour has been defined as "the case of conviction upon an indictment for any infamous offence of such a nature as to render the person unfit to exercise the office," as well as "improper exercise of the functions pertaining to the office, or non-attendance, or neglect of or refusal to perform the duties of the office."¹⁸⁵ Political responsibility entails the judge's duty to give account to the legislative and/or the executive branch of government by means of a non-judicial process. While such a practice of holding judges politically accountable is hardly used in any of the EU Member States today, in the past a strong tradition in

¹⁸³ In this context Cappelletti speaks about a "typology of judicial accountability." As in CAPPELLETTI, *The Judicial Process...*, *supra* note 49, pp. 71 *et seq.* A different classification of the various forms of judicial accountability is applied, *inter alia*, in DIANA WOODHOUSE, "Judicial Independence and Accountability within the United Kingdom's New Constitutional Settlement" in G. Canivet *et al.* (eds.), *Independence, Accountability, and the Judiciary* (London, BIICL, 2006), pp. 121 *et seq.*

¹⁸⁴ CAPPELLETTI, *The Judicial Process...*, *supra* note 49, pp. 73 *et seq.*

¹⁸⁵ LORD HAILSHAM OF ST. MARYLBONE (ed.), *Halsbury's Laws of England*, Vol. 8, 4th ed. (London, Butterworths, 1974), p. 680, § 1107.

this respect existed in common law countries. This again might partly explain the strict application of the principle of judicial immunity when it comes to civil liability claims in these countries.¹⁸⁶

While it is often not easy in practice to draw a clear line between the various concepts of judicial responsibility, at least theoretically political accountability is to be distinguished from the concept of *societal* or *public accountability*. This second type of judicial accountability, which is exercised through informal pressures and hence, lacks a specific pattern or procedure, refers to the responsibility of an individual judge or the judiciary as a whole *vis-à-vis* certain societal bodies or groups, or the general public. This type of accountability may express itself in instances as general as the exposure of the individual judge or the judiciary to public scrutiny and to criticism by the media.¹⁸⁷ A very prominent example in this context was the famous *Sunday Times* case, which was decided by the European Court of Human Rights in 1979.¹⁸⁸

In addition to the political and societal accountability of judges, there are also various forms of legal accountability, which are based on violations of the law (rather than on politically or socially reproving behaviour) and regulated through predefined legal processes. Legal (personal) accountability of an individual judge constitutes the third option in the classification scheme of judicial liability proposed by Mauro Cappelletti.¹⁸⁹ Personal liability of a judge always refers to acts and words spoken in the exercise of a judge's functions, but can also embrace behavior outside the office if it adversely affects the honor and dignity of the profession. Generally speaking, the notion of personal liability acts as an umbrella term as it can be pursued on three different levels. Accordingly, we distinguish between a judge's criminal, civil or

¹⁸⁶ Rather critical in this respect FRANK WAY, "A call for limits to judicial immunity: must judges be kings in their Courts?" (1981) 64 *Judicature* 9, pp. 390 *et seq.*

¹⁸⁷ WOODHOUSE, "Judicial Independence...", *supra* note 183, pp. 139-140.

¹⁸⁸ The *Sunday Times* Case, Judgment of 26 April 1979, Series A, no. 30.

¹⁸⁹ CAPPELLETTI, "Who Watches the Watchmen?...", *supra* note 177, pp. 36 *et seq.*

disciplinary liability, each of which forms a sub-group under the general heading of personal liability.

Notwithstanding the fact that it only happens rarely that a judge is held criminally liable for his or her actions, most countries have specific regulations for such incidents, including special rules of procedure to be applied in case a judge commits a crime in the exercise of his or her function. In the case of Germany, for example, such regulations can be as detailed as to define specific crimes that are typically only applicable to the judiciary, such as willful abuse of the judicial office and other offenses, for which - if convicted - the judge is held personally liable on a criminal law basis.¹⁹⁰ Even with respect to more general crimes such as the taking of bribes, more severe sanctions might be applied in cases when the perpetrator is to be a judge. Other national systems refrain from identifying crimes, which explicitly refer to judicial officers. Instead, countries like Spain¹⁹¹ or France¹⁹² simply subsume offenses committed by a judge in his or her function under the general catalogue of criminal provisions, which generally applies to all public servants. Such provisions usually refer to criminal acts such as corruption or refusal to perform activities in office. In the United Kingdom, only judges of superior courts such as the High Court judges enjoy an extended form of judicial immunity which also protects them from criminal liability.¹⁹³

Disciplinary liability also belongs to the broad category of personal legal accountability of judges. Noteworthy is that among the different sub-groups of personal judicial liability, each sub-type appears to have a particular function and to be pursuing a different aim. Whereas the principal function of civil liability (as

¹⁹⁰ See Articles 331 to 358 *StGB* ('*Straftaten im Amt*') This concerns especially the provisions of '*Richterbestechung*' (Article 334 *StGB*) and '*Rechtsbeugung*' (Article 336 *StGB*).

¹⁹¹ LUIS MARÍA DÍEZ-PICAZO, "Judicial Accountability in Spain" in G. Canivet *et al.* (eds.), *Independence, Accountability, and the Judiciary* (London, British Institute of International and Comparative Law, 2006), p. 211.

¹⁹² Law no. 93-2 of 4 January 1993, repealing Articles 679 *et seq.* of the Code of Criminal Procedure. On the personal liability of French judges see GUY CANIVET, "The Responsibility of Judges in France" in G. Canivet *et al.* (eds.), *Independence, Accountability, and the Judiciary* (London, British Institute of International and Comparative Law, 2006), pp. 29 *et seq.*

¹⁹³ OHLENBURG, *Die Haftung für Fehlverhalten...*, *supra* note 169, p. 61.

considered below) traditionally lies in the compensation of the harmed individual, the basic rationale behind the concept of disciplinary liability is to police a profession for the public good, which in our case means to ensure through the application of disciplinary sanctions that judges abide by their legal duties.¹⁹⁴ Disciplinary sanctions usually include warning or censure, forced transfer or compulsory retirement and go as far as to include removal from office. In Germany, for example, disciplinary control is also exercised on the basis of a formal complaint ('*Dienstaufsichtsbeschwerde*'), which can be invoked *ex officio* or by an aggrieved party.¹⁹⁵ The various national bodies entrusted with the disciplinary power can decide to apply various sanctions in order to guarantee the smooth and efficient functioning of the judiciary.¹⁹⁶

Finally, under the third subtype of personal accountability judges can be held liable for their actions on a civil law basis. The principal idea behind liability actions under civil law is without doubt one of compensation.¹⁹⁷ The judge is held personally accountable for the harm he or she has caused to the claimant, which implies that the judge has to compensate the harmed individual for the resulting damage. The concept of personal liability of judges involves once more a balancing exercise of various and partly contradicting values, to which each society attributes different levels of importance. Such values include, amongst others, the principle of judicial independence and judicial impartiality on the one hand, and the pursuit of justice as well as the principle of accountability of all public servants on the other.¹⁹⁸

¹⁹⁴ WURMNEST, *Grundzüge...*, *supra* note 23, pp. 94 *et seq.*

¹⁹⁵ Section 26 of the German Judiciary Act 1972 (*DRiG*). See also MARTINA KÜNNECKE, "The Accountability and Independence of Judges: German Perspectives" in G. Canivet *et al.* (eds.), *Independence, Accountability, and the Judiciary* British Institute of International and Comparative Law, 2006), pp. 217 *et seq.*

¹⁹⁶ In Greece, for example, jurisdiction for disciplinary actions against superior judges is attributed to the Supreme Disciplinary Council. Based on Article 91 § 3 of the Greek Constitution all disciplinary actions against the remaining judges are to be brought before special disciplinary councils.

¹⁹⁷ WURMNEST, *Grundzüge...*, *supra* note 23, pp. 94-95.

¹⁹⁸ CAPPELLETTI, "Who Watches the Watchmen?...", *supra* note 177, p. 15.

Should a judge be held personally liable for a violation of his duties? Would it not be in line with the principle of judicial independence to limit the personal liability of a judge to violations committed intentionally or with gross negligence? Should judges be tried in front of normal courts or should there be a special adjudicative body dealing with such claims? All these questions find different answers in different national legal systems and thus, also explain the large substantive and procedural diversity that exists among the various EU Member States concerning the question of personal liability of judges under civil law.¹⁹⁹

In general, the restrictions on the personal legal accountability of judges in civil law (excluding the concept of recovery actions by the State – see below) are either of a substantive and/or procedural nature, whereas the latter form of limitation is rarely used anymore. According to Chapter 4(1) of the Swedish Tort Liability Act, for example, the personal liability of a judge is subject to rigorous substantive restrictions.²⁰⁰ In Luxembourg,²⁰¹ a judge is only personally liable in damages in case of *deni de justice*, which includes offences such as refusal or failure to act or unjustified delay in the legal procedure. In other legal systems judges are only personally liable if the judge commits the violation intentionally and willfully, whereas intention certainly remains very difficult to prove in this context.²⁰² Such strict substantive limitations to the personal liability of a judge, which we also encounter in countries like the United Kingdom, render it almost impossible for a harmed individual to lodge a successful liability claim. In fact, in these cases the

¹⁹⁹ For a general overview on the principles of independence and accountability of judges in different EU Member States see various contributions in GUY CANIVET *et al.* (eds.), *Independence, accountability, and the judiciary* (London, BIICL, 2006).

²⁰⁰ See Chapter 4 Section 1 of the Swedish Tort Liability Act (*skadeståndslagen SFS 1972:207*).

²⁰¹ Articles 639 *et seq.* du Nouveau Code de Procédure Civile: “Les juges peuvent être pris à partie dans les cas suivants:

(1) s’il y a dol, fraude ou concussion, qu’on prétendrait avoir été commis, soit dans le cours de l’instruction, soit lors des jugements;

(2) si la prise à partie est expressément prononcée par la loi;

(3) si la loi déclare les juges responsables, à peine de dommages et intérêts;

(4) s’il y a déni de justice.”

²⁰² See, for example, Article 5(3) of the Judge’s Statute (*‘Estatuto dos Magistrados Judiciais’*) in Portugal according to which civil liability of judges is restricted to cases where the judge acted with intention or recklessness.

restrictions even precipitate a quasi-civil immunity of judges. Furthermore, procedural limitations can constitute an additional hurdle to overcome in that respect. Some countries choose to impose such procedural restrictions as a means of limiting liability claims against judges.²⁰³ Broadly speaking, cases of personal liability of judges under civil law are rare in practice and generally only play a marginal role in the overall scheme of judicial accountability.

This means that in a number of countries such liability is vicariously assumed by the State, meaning that the State accepts direct liability *in lieu* of its judicial officers. When talking about legal accountability, we therefore generally distinguish between the personal liability of a judge (with all its subtypes) on the one hand, and ‘vicarious’ liability of the State on the other. These two forms of legal accountability, which differ with respect to the subject which is being held accountable for the judicial act, can be applied either exclusively or concurrently with each other. Their interplay varies from one national system to the other. In some countries such as Austria,²⁰⁴ Bulgaria,²⁰⁵ the Czech Republic,²⁰⁶ France,²⁰⁷ Slovenia, Italy²⁰⁸ and Romania,²⁰⁹ vicarious liability of the State for judicial wrongs has fully absorbed the

²⁰³ This was the case, for example, in Italy before the enactment of the new Law n. 117/1988 of 13 April 1988. Until then, an action for damages against a judge required the prior consent of the Minister of Justice.

²⁰⁴ Parties who suffer damage on account of an unlawful and culpable conduct by a judge may only assert their claims *vis-à-vis* the State under the provisions of the ‘*Amtshaftungsgesetz*’ (AHG).

²⁰⁵ Article 132 of the Bulgarian Constitution limits the personal (civil and criminal) liability of judges in the function of their duties to intentional criminal offences. Disciplinary sanctions are however granted.

²⁰⁶ According to the Czech State Liability Act (No. 82/1998 Coll., on liability for damage based on maladministration or unlawful judicial decisions), parties who suffer damage on account of an unlawful and culpable conduct by a judge may only assert their claims *vis-à-vis* the State.

²⁰⁷ For a detailed account of the French system of personal liability of judges see CANIVET, “Responsibility...,” *supra* note 192, pp. 29 *et seq.*

²⁰⁸ In Italy the Law n. 117/1988 of 13 April 1988 differentiates between loss suffered as a result of criminal misconduct of a magistrate and that suffered as a result of wrongful acts that do not qualify as being criminal. The regime governing non-criminal wrongdoing deviates from the normal rules of tortious liability; it provides only for an action against the State (not against the judge, although there might be recovery by the State from the judge); it establishes immunity from liability in the case of construction and interpretation of legal rules and finding of facts and evaluating evidence; and it provides that the fault standard required is that of gross negligence.

²⁰⁹ Articles 93 and 94(7) of the Romanian Magistrates’ Statute Act (Law n. 303/2004).

personal liability of the judge. Consequently, this has led to a situation in which the harmed individual can only claim compensation for damages from the State.

In such systems of exclusive public liability, the State usually retains the right to sue the judge who has caused the damage in order to recover the damages it has previously paid to the victim under the scheme of vicarious liability – a so-called “recovery action”.²¹⁰ However, even though there might in principle be a right for the State to recover loss from the judge, in most cases such recovery actions are limited by the amount the State can ask the judge *qua* tortfeasor to repay. This is the case in countries like Estonia,²¹¹ Italy²¹² and Lithuania.²¹³ Alternatively, under the legal system of countries such as Romania²¹⁴ and Portugal,²¹⁵ recovery actions are restricted to cases when the judge has acted in bad faith or, at least, been grossly negligent.²¹⁶ In Luxembourg, while the State can generally invoke recursory actions against public servants, such action is excluded if the harm was committed by a judge. The only system which allows for full regress by the State from the judge, who has caused the damage, is Slovakia.²¹⁷ Overall, the benefit of such system of vicarious liability of the State is that it spares the judge from being confronted with direct liability claims by allegedly harmed individuals.

²¹⁰ Terminology employed by CAPPELLETTI, “Who Watches the Watchmen?”..., *supra* note 177, p. 33. In German we speak of a ‘*Regressanspruch*’ or an ‘*action récursoire*’ under French law.

²¹¹ See Article 89(4) and (5) of the Estonian Public Service Act.

²¹² According to the Law n. 117/1988 of 13 April 1988.

²¹³ Article 5 of the State Liability Act (Law on compensation for damage caused by unlawful actions of the State institutions) of 21 May 2002.

²¹⁴ In Romania the State can only file a separate claim against the magistrate in question if the magistrate has acted in bad faith or with gross negligence (Article 94(7) Magistrates’ Statute Act, Law n. 303/2004).

²¹⁵ Article 5(3) of the Judges’ Statute (*Estatuto dos Magistrados Judiciais*) establishes that that the State can only seek redress against the judge, if he or she acted with intention or gross negligence.

²¹⁶ Article 8 of the Italian Law n. 117/1988 declares that the amount of redress demanded in a recovery action by the State cannot exceed one third of the judge’s annual wage.

²¹⁷ According to the Law No. 514/2003 Coll. on liability for damage caused in the exercise of public power.

Contrary to the concept of exclusive State liability, other EU Member States such as Greece,²¹⁸ Luxembourg²¹⁹ and Spain²²⁰ adhere to a system of judicial responsibility in which the liability of the State is concurrent with, instead of exclusive to, the personal liability of the judge.²²¹ Spanish law, for example, does not attribute exclusivity to the principle of vicarious State liability, but additionally uses a regime of personal liability whenever judges have acted willfully or negligently in the exercise of their functions.²²² A similar system is entertained in Greece where the judge and the State are jointly liable.²²³ The parallel application of the two concepts of civil liability certainly opens up additional avenues for the claimant. However, it can be observed that under the Spanish as well as the Greek system, the conditions which need to be fulfilled in order to invoke the personal liability of a judge, tend to be more restrictive. While the strict conditions applied to the concept of personal liability of judges seem to be justified in view of the aim to protect judges from assaults upon their judicial independence by civil suits, the same cannot be said for the concept of State liability. After all, State liability shields the judge from any outside pressures in the decision-making process by transferring the responsibility for his or her actions and the resulting financial burden to the State. Moreover, as mentioned before, recovery actions by the State against the judge as tortfeasor are frequently limited by law.

These considerations directly lead us to the last type in the general scheme of judicial responsibility, namely the legal (vicarious) accountability of the State for judicial breaches. This form of judicial accountability will be the primary focus of our analysis. Legal (vicarious) accountability of the State for damage caused by the

²¹⁸ Article 6 § 1 of the Law 693/1977.

²¹⁹ Article 1140 Code Judiciaire: “*Les juges peuvent être pris à partie dans les cas suivants: (1) s'ils se sont rendus coupables de dol ou de fraude, soit dans le cours de l'instruction, soit lors des jugements; (2) si la prise à partie est expressément prononcée par la loi; (3) si la loi déclare les juges responsables à peine de dommages-intérêts; (4) s'il y a déni de justice.*”

²²⁰ Article 411 Ley Orgánica 6/85, de 1 de Julio, del Poder Judicial (LOPJ).

²²¹ In most cases where State liability is applied exclusively, the State has the possibility to invoke a “recovery” against the judge.

²²² Article 411 Ley Orgánica 6/85, de 1 de Julio, del Poder Judicial (LOPJ).

²²³ Article 105 of the Introductory Law to the Greek Civil Code in combination with Article 6 of the Law 693/1977.

judiciary in the exercise of its judicial functions is a predominant model among all the instruments of judicial accountability used in the various national legal systems across Europe. Characteristically classified as a method of legal responsibility under civil law, the concept of vicarious State liability is, as mentioned before, applied either exclusively or concurrently with personal accountability of the judge.

Vicarious liability of the State appears to be the most advanced solution among the vast range of options offered to ensure full accountability of the judicial branch for all its actions. In fact, the primary responsibility of the State for damage caused by the judiciary embraces simultaneously two principal objectives contained in any liability claim. Not only will the State's primary liability ensure adequate compensation for the harmed individual, but at the same time it protects the maxim of judicial independence by shielding judges from having to confront directly liability claims by dissatisfied litigants.

d) *Tertium comparationis*

Against the backdrop of this myriad of possibilities for holding judges accountable for their actions, the current study is steered towards this specific form of judicial accountability. Leaving aside the political as well as the public dimension of judicial responsibility, we will focus therefore our inquiry on the various ways the EU Member States hold judges legally accountable in civil law. Even though the general concept of judicial responsibility under civil law embraces, as we have just seen, not only the responsibility of the State, but also the judge's personal responsibility, our study will focus on State liability for judicial acts. In a nutshell, we are not concerned about instruments of criminal and/or disciplinary liability, which are both important features of the general concept of judicial responsibility, nor are we dealing with a judge's personal liability, which may be incurred by officials who have performed judicial acts causing damage, and which may arise either from the principal action brought by the victim herself or from an action for indemnity brought by a public authority. With respect to our previous discussion on the definition of a judicial act

per se,²²⁴ we will confine our analysis primarily to judicial acts *stricto sensu*, i.e. those acts performed by the judiciary in the course of contentious court proceedings or, as Shetreet labelled it, judicial tasks involved in “substantive” decision making, which form the third part of the principle of adjudication.²²⁵

What is interesting in this context is first of all that, despite the CJEU’s claim to have found identical features common to all Member States,²²⁶ it appears at first glance that the national liability regimes in this category differ substantially from one Member State to the next. What is common to all the Member States, on the other hand, are special legislative provisions concerning compensation payments by the State for errors in the criminal justice system. This is however an issue, which stands at the sidelines of the generic debate on judicial accountability. Such errors are generally considered to be neither a case of personal responsibility of judges nor one of State liability. Instead, it is usually formulated as a case of direct and strict liability of the State to provide the victims of miscarriages of justice with adequate indemnity or reparation, which has been previously established by law, instead of the full reparation of the damage caused. Two classical examples of such errors that are regulated in an explicit manner in most EU Member States are the individual’s right to compensation for arbitrary detention on remand and for false conviction. The awarding of a lump sum by the State in such cases reflects the indemnifying, but not fully reparatory character (as in granting full compensation) of these regulations.²²⁷

Therefore, contrary to the impressive and celebrated work on the question of judicial responsibility by one of the most distinguished comparativists, Mauro

²²⁴ For a precise definition of the terminology applied in the course of this study see pp. 45 *et seq.*

²²⁵ Hereinafter referred to as “judicial acts *stricto sensu*”. See Shetreet’s definition of the notion of adjudication on pp. 49-50.

²²⁶ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 27.

²²⁷ For national compensatory schemes for miscarriages of justice see for instance the Finnish Act on Compensation from State Funds for the Arrest or Detention of an Innocent Person (Act No. 422/1974); Article 626 of the French *Code de Procédure Pénale*; Article 504 of the Romanian Code of Criminal Procedure; Article 7(4) of the Greek Constitution in combination with Articles 533 to 542 of the Greek Code of Criminal Procedure; the *Loi du 30 avril 1981 concernant la révision des procès criminels et correctionnels et les indemnités à accorder aux victimes d’erreurs judiciaires* (*Mémorial A* 1981, p. 755) in Luxembourg; or chapter 54 of the Code of Criminal Procedure in Poland.

Cappelletti, more than twenty years ago,²²⁸ we have reduced the scope of our project to finding the answer to this question only with respect to one type of judicial accountability, which is the principle of State liability for harm caused by erroneous judicial acts. On this issue, however, we hope to arrive at a final tabular overview which describes the prevailing situation in the European Union and all its Member States.

2. The methodological approach

a) Method of analysis: the questionnaire

A significant element for the validity of any comparative study is its choice of its methodological foundations. A suitable comparative law methodology serves as the key to bring to the fore the richness of all the principles and data extracted from 27 different national legal orders. In fact, since our comparative study will be an exercise in legal cartography, the methodological aspect of the project is crucial.

Methodologically, the collection of information and data was based on the answers we received to our questionnaire, which was specifically designed for the purpose of this study and sent to selected country experts from each of the 27 EU Member States. The questionnaires were first distributed in the spring of 2005 and the process of collecting, validating and clarifying the information contained in the experts' answers was completed by May 2008. While in many cases language barriers did not allow us to validate information provided by the various country experts ourselves, a strict minimum requirement of two fully-completed surveys from each Member State was applied in order to be able to compare and confirm the information we received. Thereby, the process of clarification and the task of following-up on those replies, which were not sufficiently clear, took up a large part of the overall time spent on establishing a valid comparative assessment.

²²⁸ See, amongst others, MAURO CAPPELLETTI, *Giudici irresponsabili? studio comparativo sulla responsabilità dei giudici* (Milano, Giuffrè, 1988).

The country-specific information on the various national legal systems in the 27 EU Member States was completed and expanded in the course of two different research missions, the first one in October 2005 to the *Max Planck Institute of Comparative Public Law and International Law* in Heidelberg, Germany. A second mission followed in the form of an extended internship at the Court of Justice of the European Union in Luxembourg in the spring of 2008, during which we had access not only to the vast collection of comparative legal literature and primary resources at the Court, but most of all to a valuable and unique pool of human resources in the form of the European and national legal experts who work at the CJEU.

Nevertheless, despite all our efforts, some questions remained unanswered and the categorization of a handful of Member States could not be completed with utmost certainty. We have, in order to alert the reader, marked these cases with an asterisk in the various graphs which we will be displaying in the following chapters. The analysis of the national reports in these countries has proven to be a complicated task because of, among other things, the abundance of material, the need to understand the specifics of particular legal orders, and different terminology.²²⁹

b) Ensuring the comparability of concepts

Among the array of different approaches in the field of comparative law, the present study specifically recognizes the importance of the functional approach, which holds that the aim and purpose of comparative law is to identify and compare functionally equivalent rules.²³⁰ In addition, whilst taking account of comparative law, a continuous attempt will be made to contrast the various elements with the situation prevailing under European Community law after *Köbler*.

Alan Watson rightly described the comparativist's aim of seeing a particular legal pattern common to many divergent systems as "one of the greatest perils of

²²⁹ These countries concern especially Malta and Latvia.

²³⁰ K. ZWIEGERT and H. KÖTZ, *An Introduction to Comparative Law*, 3rd ed. (Oxford, Clarendon Press, 1998), p. 34.

comparative law”.²³¹ The danger lies in the overly ambitious intention of comparativists to gain comparable results. This often leads to inaccurate results, which are achieved only by gross misstatements of relevant legal facts. The way to reach reliable results is to attain the right comparative perspective by means of a sound comparative methodology. Aware of the pitfalls of any comparative exercise, a preliminary problem we had to resolve was how to obtain comparable answers to the questions we wished to address about different legal systems. The answers had to refer to identical questions interpreted as identically as possible by all the country experts. Besides, the answers had to be self-sufficient in two ways. First, the information provided for each Member State had to be complete, so that no additional explanations would be required. Secondly, the answers had to be reliable in the sense that they could be accepted at ‘face value’. Even though we relied on at least two experts per Member State, our goal was that in theory even one single completed questionnaire should be sufficient in order to obtain a general picture of the State liability regime in that country.

As a general guideline, we have designed the questions with a sufficient degree of specificity as to require each country expert address all the decisive factors in his or her system. After all, we did not want merely to rely on the concept of State liability for judicial breaches as outlined in the country’s legal sources, but also provide information on the application of this principle in the jurisprudence of the courts. This proved to be a crucial element especially in those countries where we were faced with an absolute silence of the legislature on the issue of State liability for erroneous judicial acts. As for example in the cases of the Netherlands, Slovenia, Belgium or Greece, it was most often a decisive judgment by a superior court which established a country’s approach to such a principle.²³² Furthermore, in light of the fact that the *Köbler* case is a rather recent judgment by the CJEU and the *Köbler*-doctrine a frequently discussed topic in legal scholarship, we had to ensure that to design the

²³¹ ALAN WATSON, *Legal transplants: An approach to comparative law* 2nd ed. (Athens, Georgia & London, The University of Georgia Press, 1993), p. 15.

²³² See, for example, in the case of Belgium, *Cour de Cassation (1^{re} chambre), De Keyser et crts c/ Etat belge [ministre de la Justice]*, 19 décembre 1991, *JT*, 1992, with respect to the Netherlands see *Hoge Raad*, 3 December 1971, *NJ* 1971, p. 137.

questions in a way as to allow for an objective analysis of each national system. In order to present the country experts with a neutral, fact-based questionnaire and in an attempt to flush out any subjective perceptions, comments or suggestions on the ruling itself or on the principles underlying the national systems, our template excluded any reference to *Köbler*. In the development of the questionnaire we have therefore tried to take all these aspects into consideration, but nevertheless keep the questions as short, clear and precise as possible. In the end, we arrived at a set of nine questions, which addressed the following questions.

c) The central comparative questions

In line with the above considerations, the template of our questionnaire, which was sent out to our entire pool of country experts, had the following format:

Questionnaire

State Liability Regime with Respect to Breaches Committed by the Judiciary

-

Comparative National Legal Analysis

Name:

Country:

*Please answer the following questions with reference to the national law
of your home country (or the country specifically assigned to you)!*

NOTA BENE: With the exception of question 6, all other questions contained
in this survey refer exclusively to
the liability of the State for violations by its organs,
rather than the personal liability of a single public officer.

Question 1:

Is there an explicit constitutional provision or a fundamental ruling of a Constitutional Court regulating the question of **State liability** in general?

YES

NO

If yes, please specify:

Question 2:

What is the applicable **national law** (or **jurisprudence**) containing the core provisions concerning State liability?

Question 3:

What is the **primary function** of the national legal provisions/case law on State liability?

Repairing damages

If yes, please specify:

Contributing to law enforcement

If yes, please specify:

Question 4:

Does the national Constitution contain a specific principle protecting the **courts** (or **courts of last instance**) with respect to State liability claims based on violations committed by the judiciary?

YES

NO

If yes, please specify:

Question 5:

Has one of the following been explicitly restricted or limited in the Constitution/national law on State liability?

a) State Liability for **administrative breaches?**

YES

NO

If yes, please specify:

b) State Liability for **legislative breaches?**

YES

NO

If yes, please specify:

c) State Liability for **judicial breaches?**

YES

NO

If yes, please specify:

Question 6:

a) Despite liability of the State for judicial breaches, is there also a separate regime of **personal liability** of judges in your respective national legal order?

YES

NO

If yes, please specify:

b) To what extent is the **personal** liability of a judge different from the provisions on general liability of the **State** for judicial failures? And is there a difference in the **functions** (repairing damages vs. contributing to law enforcement) these two parallel systems are targeted at?

Question 7:

Does the Constitution/national law on State liability exclude State liability claims for **judicial violations** as a whole?

YES

NO

Please specify:

Question 8:

Is there any noteworthy case law/significant precedent with respect to the question of State liability for breaches of law incurred by the **judiciary**?

YES

NO

If yes, please specify:

Question 9:

Out of the four choices indicated below, into which category would your national regime of State liability for **judicial** breaches most likely fit?

1.) Total exclusion by law/jurisprudence of State liability for judicial breaches.

Restricted system of State liability for judicial breaches under domestic law.....

2.)...depending on which national court committed the violation.

3.)...limited by the degree of fault involved in the judicial violation.

4.) Comprehensive recognition of State liability for judicial breaches under national law.

Thank you very much for your time and effort!

II. Community-wide spectrum of State liability for judicial breaches under the domestic law of the 27 EU Member States

Ubi Jus, Ibi Remedium?

1. Preliminary screening of the various national approaches

Looking at the problem of State liability for judicial breaches from a comparative perspective, our first task was to scan the information we had accumulated on each country and to undertake a first screening of the results. This preliminary exercise helped us to start comparing the architecture of all the systems in a general manner and to identify common principles and traditions, but also apparent differences, between the various liability regimes. In the process of analysing the wealth of information on the different systems of public liability, we tried to underline the most salient features of each national regime.

One of the difficulties we faced in the course of our analysis was the fact that we were confronted with different approaches on how to regulate the question of State liability for judicial breaches. First, there are those countries, which explicitly address the issue of the State's liability for judicial acts, be it in order to exclude such principle altogether or to restrict its application in various forms. The second group comprises those countries, which indeed have a general legal framework regulating the broad question of State liability, but which do not specifically address those liability proceedings in which the judiciary acts as the tortfeasor. The latter group certainly made it much more difficult to classify the system on a purely normative basis and required us to look beyond the normative foundation at the practical application of those rules.

Despite this general observation, the variety of factors, traits and formats that have been addressed in our questionnaire, have allowed us to identify additional and more significant differences and similarities between the systems. Generally speaking, we tried to pursue a similar methodology to the one applied in the 'Ius Commune

Casebook Project²³³ and to be guided by the maxim that “the emphasis is not so much to create uniform rules as to find similar solutions and rules in the existing laws (and if they cannot be found, to state the differences) and to analyse and compare the legal reasoning behind them.”²³⁴

2. Principal approaches dominating the European landscape: proposal of a classification scheme: “*Four Model Member States*”

The identification of core characteristics among all the national legal systems then allowed for the formation of different pre-defined groups. After establishing the classification and identifying the various groups, all the national regimes of State liability for erroneous judicial decisions were, depending on their respective attributes, assigned to one of the four groups. Our final typology will then display the spectrum of the different regimes of State liability for judicial breaches in the national Member States classified by groups. In order to explore the particular attributes and characteristics attached to each group, we have, by use of a selected national prototype, outlined the most pertinent features shared by all the countries belonging to a specific group. Moreover, we provided a tabular overview of all the countries classified under each particular group. Finally, drawing threads from all the four groups, the concluding part will position all the Member States into the established legal taxonomy.

As has been underlined before, the aim of this study is not to evaluate the existing national structures, but to categorize them according to their most pertinent features from a substantive point of view. In fact, the principal method of screening in this study was based on identifying the most significant characteristics of these different national solutions. It seemed the most pragmatic solution for the purposes of our study to choose an approach whereby we would be able to present the large

²³³ For further details on the project see: www.casebooks.eu/index.php.

²³⁴ VAN GERVEN, "Casebooks...", *supra* note 46, p. 69. See also WALTER VAN GERVEN *et al.*, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford, Hart Publishing, 2000).

spectrum of State liability regimes for judicial breaches as it exists in the 27 EU Member States, but at the same time offer a more detailed look into each one of the different approaches dominating the European landscape.

In light of the various characteristics identified in a first screening exercise of the material, we have created four functional and explanatory groups. It is crucial to note at this point that the four groups have been set up merely on the basis of the specific characteristics they represent with respect to the concept of State liability for judicial breaches. Consequently, results obtained in the course of this categorization were not driven by the idea to establish a certain hierarchical order among the national systems or by a desire to find “the best” and/or “the worst” group of countries. The order in which we will consider the four groups in the course of this comparative exercise does not reflect any ranking or value-judgment.

Moreover, our classification scheme allows for overlapping, meaning that countries featuring more than one of the pertinent characteristics that define each group will automatically qualify for more than one group and will not be placed in one single category. This, of course implies that those Member States which qualify for several groups naturally also impose several forms of restrictions on their State liability regime for erroneous judicial acts. Hence, notwithstanding our continuous intention to exclude any form of hierarchy between our four groups of classification, we do think it is fair to argue that the more groups a Member State qualifies for, the greater the restrictions this country imposes on its system of State liability for erroneous judicial acts.

Before introducing these systems group-by-group through the use of four representative prototypes, we will briefly explain the distinguishing characteristics of each regime, which will, however, be laid out in more detail in each of the forthcoming chapters that have been devoted to one group each. In sum, the next four chapters, that is chapters III to VI, will outline groups I to IV in that order.

a) GROUP I

Total exclusion of State liability for judicial breaches under national law with limited exceptions provided by the ECHR and/or other international agreements

The first group in our taxonomy contains all those countries in which the general concept of the State's liability for breaches of law committed by the national judiciary has been rejected in an explicit manner, be it in a clear objection to such a possibility in a law or statute, or on the basis of an established line of jurisprudence in the country. The only exceptions allowed in this context are instances of State liability for judicial breaches as regulated under international law, such as the ECHR or other international agreements, to which the country is a signatory.

Apart from the few exceptions arising from such international treaty obligations, some countries take the view that a judge is generally unable to commit any fault, which in turn makes any system of State liability for judicial failures superfluous. Those Member States of the European Union which take this approach will be considered in chapter III of our study. The prototype we have chosen for this group will be England and Wales. By exploring the historical roots of the special status of immunity awarded to the judicial branch in this country, we hope to also reach a better understanding just as to why these countries are so reluctant to allow for the State's liability in cases of harm caused by a judicial act. At first glance, it appears that countries classifying under group I attribute a special status of immunity to the judiciary, which stems from the legal tradition of these Member States.

As for the exceptions provided under group I, the analysis of the ECHR will provide the perfect opportunity to follow up on some of the arguments used by the Court and Advocate General Léger in *Köbler* regarding the recognition of a principle of international State responsibility for judicial breaches. Moreover, we will compare the *Köbler* ruling with the equivalent national restrictions on State liability for judicial breaches in order to pinpoint at the substantive and procedural difficulties the Member States belonging to group I will eventually face under the *Köbler*-doctrine.

b) GROUP II**Restricted scope of State liability for judicial breaches according to the source and/or the nature of the judicial act causing the breach**

Group II is one of the more diverse out of the four groups of our classificatory scheme. The distinctive feature which characterises the countries belonging to this group is the restriction of the respective national system of State liability for judicial breaches according to either the *source* or the *nature* of the judicial act. Contrary to group I, we are now dealing with countries that recognize the existence of a general concept of State liability for harm caused by judicial authorities. However, there are still restrictions on the application of such a principle in practice and these can be further classified into two different sub-groups. The first sub-group comprises all countries which impose limitations on their State liability regime and thus exempt specific courts (usually higher courts) from any form of liability, i.e. the source of the breach. In this way they also render the State immune against State liability claims for acts performed by these courts. The second form of restriction concerns acts of a specific nature, which fall outside the purview of State liability. A prominent case in this respect seems to be Italy, whose restrictive approach in this context has recently even been scrutinised by the CJEU. While the prototype representing the systems of State liability featuring restrictions related to the source of a judicial act, will be Austria (considered to fall into the first sub-group of group II), we will also examine the case of Italy when we come to consider the second sub-group of group II.

c) GROUP III**Restricted form of State liability under domestic law
limited by the degree of fault in the judicial act**

A leading characteristic of group III of our taxonomy is the fact that all Member States qualifying for this group restrict the possibility of holding the State liable on the basis of a harmful judicial act by requiring illegality and fault. There must also, be a causal link between the fault and the damage incurred. These regimes certainly do

not have an objection in principle to State liability, but they intrinsically tie the invocation of a State liability claim for judicial breaches to a requirement of qualified fault. A classic example of a country adhering to group III of our taxonomy is France. France also seems particularly interesting and challenging given that the development of the State liability regime in France seems to have been heavily influenced by the long-standing tradition of the strict separation of courts in France. Furthermore, one of the key questions that will be addressed in this third group is a problem which has already been briefly discussed in the first chapter of our study, namely the compatibility of requirements of qualified fault in the context of State liability claims under national law with the newly-established requirement of a ‘manifest breach’ in *Köbler*. Since the Court has never introduced a direct reference to the element of fault in its *Francovich*-line of cases, a number of Member States will be confronted with the question of how to interpret the Community law requirement of a manifest breach in the context of the principle of national procedural autonomy. In this context we will also address the question of a national supreme court’s breach of Article 234(3) EC, which has been declared by the CJEU to be a decisive criterion in its qualification of a manifest breach.

d) GROUP IV

Procedural Obstacles to a Comprehensive Recognition of the Principle of State Liability for Judicial Breaches

The last group of our categorization broadly embraces all those countries featuring procedural obstacles to the invocation of State liability for judicial breaches *stricto sensu*. While Member States pertaining to this last category also recognize a general principle of State liability for judicial breaches under national law, the concept is nevertheless subject to heavy procedural restrictions. Some of the Member States belonging to group IV appear to have set up an entire procedural ‘armoury’ to fend off State liability claims based on judicial acts, which at times almost amount to a quasi-immunity of specific courts. These procedural barriers range from requirements such as the application of the procedural rule of *res judicata* to the basic principle of primacy of appellate review. One of the key concepts of this fourth group

is the protection of judicial decisions which have acquired the force of *res judicata*. While this seems to be a common feature among the national systems, in *Köbler* the CJEU added its own view to the debate on the interpretation of this principle. One of those countries which will be heavily affected by the practical application of the *Köbler*-principle under national law is Belgium, which will serve as our prototype for this last group.

Having considered these general characteristics rather abstractly, we turn to discuss each country's approach in greater detail by looking at the pertinent characteristics of every group, principally through the closer examination of our national prototype for each group. This allows us to show comprehensively the full spectrum of State liability regimes in the European landscape. Generally speaking, it is acknowledged that one important use of comparative law is to provide a critique of one's own legal system.²³⁵ In our case, the point of reference will be the regime of State liability for judicial breaches as set up by the EU's Court of Justice in the *Köbler* ruling. This newfound 'European model' will, in due course, be compared with the prevailing spectrum of different national liability regimes in force in the 27 Member States.

Despite all the diligence applied in the course of the evaluation of the various questionnaires and the verification of the compilation by the different country experts, it is difficult in a study of this scope and complexity to eliminate all chance of misclassification. The reader will appreciate that the categorization of 27 countries on the basis of documentary evidence is a somewhat hazardous enterprise, which is, as any quantitative analysis, certainly not free from a certain level of digression. Even though utmost care has been applied in classifying the different systems, the evaluation of law and jurisprudence always involves a degree of uncertainty on which reasonable minds may differ. Needless to mention, all mistakes are ours alone.

²³⁵ KIIKERI, *Comparative Legal Reasoning...*, *supra* note 157, pp. 30 *et seq.*

CHAPTER III.
TOTAL EXCLUSION OF STATE LIABILITY FOR
JUDICIAL BREACHES UNDER DOMESTIC LAW
(GROUP I)

Even though it is impossible to establish a hierarchical order among our four categories because the restrictions towards the principle of State liability for judicial breaches in each group turn out to be so diverse and multi-faceted, there is nevertheless one group of Member States that apply, without doubt, the most radical solution in this respect. At the far end of the EU-wide spectrum of State liability for judicial breaches, we encounter examples of the most restrictive national legal frameworks towards public liability claims for harm incurred by the judiciary. Those Member States which reject entirely the idea of State liability for judicial breaches under national law, form group I of our analysis, and comprises countries such as the United Kingdom, Ireland, the Netherlands and Bulgaria.²³⁶ Group I therefore contains all national legal systems, which share comparably strict characteristics and severely limited approaches in their public liability regimes for damage caused not by the administrative or the legislative branch, but exclusively by the national judiciary.

In line with our methodological framework as outlined in the previous chapter, the following pages will examine a typical example of this most stringent approach by way of one representative example. For group I our national prototype will be the United Kingdom. The choice of the representative example for group I and the ambit of the following study on the selected national legal framework have been the subject of careful deliberation. After all, the national example for each of the four groups should be able to highlight the most distinctive characteristics common to the Member States in each respective category of our classification scheme. Needless to say, despite sharing similarities and common solutions with respect to the concept of State liability for judicial breaches, all these countries certainly represent independent and

²³⁶ For a general overview of these countries consult the graph at the end of this chapter on p. 168.

divergent legal systems, which have distinct national characteristics and idiosyncrasies. It was therefore not an easy task to select one representative example out of such a variegated pool of countries. Eventually, however, the concept of State liability for judicial breaches in England and Wales appeared to be the most suitable of all the available candidates in group I.

The Case of the UNITED KINGDOM

As the representative example of group I, the United Kingdom²³⁷ legal system also exhibits its own conceptual particularities. It would be impossible to avoid these altogether in the course of our analysis and due to their significance, it is probably best to consider them upfront. In British law we encounter two peculiarities which differ from the concepts and the terminology we usually apply in the field of State liability in the majority of EU Member States. The concepts of ‘the Crown’ and ‘tort’ require a short digression on the basic terminology used in the British context. This should also serve the reader as an ancillary tool to understand the foreign legal concepts, which will thereafter be referred to frequently in the course of this chapter.

Overall, the current study of English law plainly focuses on the rules of State liability and does not purport to give a broad introduction to either English civil or administrative law. Furthermore, the analysis of the State liability regime in the United Kingdom will be confined to the sphere of tort, thus excluding actions based on contract and restitution. In fact, our study will cover a rather amorphous sphere of the British legal order, where the challenges of this delimitation exercise are self-evident. Considering the large number of countries included in the current comparative study, the differences in the conceptualization of ‘the State’ as a political and legal entity already create difficulties of comparison. These differences also explain the diversity of expressions commonly used in reference to State liability, which will be applied interchangeably in the course of the forthcoming analysis.

²³⁷ While clear the relevant Member State considered in this chapter is the United Kingdom, the focus of our analysis will be the legal system of England and Wales. The separate jurisdictions of Scotland and Northern Ireland will therefore not be considered. In any case, while specific legal provisions may differ in each of the United Kingdom's three jurisdictions, the general principles of State liability are the same and EU law applies equally in all three.

Accordingly, in this study the notions of ‘public (authority) liability’ and ‘governmental or State liability’ are to be regarded as synonyms. However, what renders the current task even more challenging is the fact that it proves particularly difficult to delimit a study on State liability under the law of England and Wales where we are confronted with the complete absence of an applied legal definition of ‘the State’.²³⁸

I. The Concept of State Liability for Judicial Breaches in the UK

The simple heading of this chapter on State liability for judicial breaches in England and Wales already raises at least two substantial questions of definition. What precisely do we mean when referring to ‘the State’ in British law? How do we define the concept of the State and its organs and especially the judiciary in this context? And secondly, how should we apply the notion of public liability in the UK in light of the domestic practice regarding torts for harmful acts of public authorities? In order to take full account of the particularities in British law and in an attempt to set the stage for an in-depth analysis of our central question on remedial claims of damages for judicial breaches, a few preliminary definitions will clarify the terminology we will employ in the course of this chapter. As mentioned before, the notion of ‘the State’, which in itself is a concept that has proven difficult to define, is especially ambiguous in its interrelation with the concept of the Crown in the United Kingdom.

1. The nature of the Crown and the concept of the State in the United Kingdom

It almost seems paradoxical that despite the fact that Thomas Hobbes,²³⁹ one of the greatest English political philosophers, was among the first to articulate a modern concept of the State, the UK remains an exception within the Western legal

²³⁸ See HARLOW and RAWLINGS, *Law...*, *supra* note 162, p. 32.

²³⁹ See, *inter alia*, THOMAS HOBBS, *Leviathan* (Harmondsworth, Penguin Books, 1968).

tradition.²⁴⁰ Dyson even went as far as to portray the UK as a “stateless society”,²⁴¹ referring to a society that not only lacked a State tradition, but where the political and the legal concept of the State were not even developed, and the term itself was rarely used. In English literature reference was traditionally made to kingdom, country, people, nation, and government. In the UK, the State as a heuristic concept has not been widely employed in constitutional law or legal theory, since the entity endowed with legal personality is the Crown. Notwithstanding the fact that even in the UK the notion of the State is now casually used in particular in conjunction with European Community law, under national law the State still does not qualify as a legal entity and still lacks legal personality.²⁴²

Seen from a different angle, the mere assertion that the law of England and Wales does not formally recognize a concept of the State is also blurred. After all, there is generally a degree of ambiguity in the concept of the State and the precise definition of the term ‘State’ itself. However, if one uses the notion of the State to refer to an abstract idea of executive government, the nearest equivalent legal concept in the UK would be the Crown.²⁴³ Consequently, two decisive questions will have to be briefly addressed in the subsequent paragraphs. Is it possible to use ‘the Crown’ as a synonym for ‘the State’ in its function as an organized public entity? And if not, to what extent is the Crown capable of providing an alternative to the State as a legal concept?²⁴⁴

²⁴⁰ MAURICE SUNKIN and SEBASTIAN PAYNE, “The Nature of the Crown: An Overview” in M. Sunkin and S. Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford/New York, Oxford University Press, 1999), p. 1.

²⁴¹ DYSON, *The State Tradition*, *supra* note 161, pp. 36-44.

²⁴² *Ibid.*, p. 37.

²⁴³ See MARTIN LOUGHLIN, “The State, the Crown and the Law” in M. Sunkin and S. Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford/New York, Oxford University Press, 1999), p. 33.

²⁴⁴ *Ibid.*

a) The nature of the British Crown

*The crown as an object is a piece of jewelled headgear under guard at the Tower of London. But it symbolizes the powers of government which were formerly wielded by the wearer of the Crown.*²⁴⁵

It is difficult to come up with an all-embracing definition of the British Crown. Over time interpretations have varied and even though it is at the heart of the British constitution, the nature of the Crown and its powers remain shrouded in uncertainty and continue to generate controversy. In fact, the numerous interpretations and structural comparisons used to describe the Crown have left some authors with the opinion that the Crown as a legal concept “has been strained to the point of incoherence.”²⁴⁶ Or, in the words of Sir William Wade, the nearer the judges come to the “bedrock of the Constitution”, the less certain they become.²⁴⁷ Even basic questions of definition related to the Crown tend to result in a myriad of different answers and yet it seems that in this context no single definition commands collective assent.

A sharp distinction is traditionally drawn between the Monarch acting in his/her personal capacity and the Monarch or ‘the Crown’ as the political entity, which exercises governmental powers. Then again ambiguity arises as to whether the political (as opposed to the personal) capacity of the Crown is simply expressed through the Monarch exercising his or her governmental powers or whether it is in fact apposite to equate the Crown in its political functions with the auxiliary device²⁴⁸

²⁴⁵ Lord Simon of Glaisdale in *Town Investments Ltd. v. Department of the Environment* [1977] 1 All ER 813, 831c.

²⁴⁶ LOUGHLIN, “The State, the Crown...,” *supra* note 243, p. 59.

²⁴⁷ SIR WILLIAM WADE, “The Crown, Ministers and Officials” in M. Sunkin and S. Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford/New York, Oxford University Press, 1999), pp. 23 *et seq.*

²⁴⁸ Or “term of art” as Lord Diplock put it in this context in the case *Town Investments*, *supra* note 245, 831c.

of either a *corporation sole* or a *corporation aggregate*.²⁴⁹ A familiar periphrasis that has been frequently used to describe the Crown is its association with a *corporation sole*, which under English law is a legal entity, made up of one single person.²⁵⁰ In contrast to a *corporation aggregate*,²⁵¹ which consists of two or more people, a *corporation sole* is a guarantor for legal continuity by way of direct vertical transmission of power from one holder of the position to the next. However, both auxiliary constructs, which are used to describe the British Crown, remain criticized in theory and flawed in their practical application.²⁵² Even though it would be in the general interest to define the Crown conclusively, not least because the law grants exclusive privileges and immunities to the Crown, overall, contradictions and loose ends with respect to its definition prevail to this day. Nevertheless, it remains indisputable that the British Crown, whatever its precise ambit, possesses wide-ranging powers, which are concomitant with the functioning of the constitutional and political system of the United Kingdom.²⁵³

b) The concept of 'the State' in the United Kingdom

Constitutional thought and doctrine in the United Kingdom have largely dispensed with the concept of the state. Instead of the state we have the Crown, which serves as a central, organising principle of government. The Crown is associated with the idea of executive authority rather than with

²⁴⁹ TOM CORNFORD, "Legal Remedies against the Crown and its Officers before and after M" in M. Sunkin and S. Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford/New York, Oxford University Press, 1999), p. 233. See also MARK FREEDLAND, "The Crown and the changing nature of government" in M. Sunkin and S. Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford/New York, Oxford University Press, 1999), pp. 114 *et seq.*

²⁵⁰ Lord Woolf uses this comparison in *M. v. Home Office and another* [1993] 3 All ER 537, 566.

²⁵¹ On the Crown as a corporation aggregate, see Lord Simon in *Town Investments*, *supra* note 245, 830g-834d.

²⁵² The concept of the Crown has opened up a wide spectrum of definitions. In this context see, for example, FREDERIC WILLIAM MAITLAND, *The constitutional history of England: a course of lectures delivered by F.W. Maitland* (Cambridge, Cambridge University Press, 1908), p. 418 and Lord Diplock's definition of the Crown in the case *Town Investments*, *supra* note 245, 815h-821g.

²⁵³ The powers of the Crown consist, *inter alia*, in the appointment of the government, the dissolution of Parliament and the enactment of primary legislation as well as the practice of international relations and the declaration of war. SUNKIN and PAYNE, "The Nature of the Crown...", *supra* note 240, p. 1.

that of the common interest: the major public powers are vested in the Crown, or in ministers who are the servants of the Crown.²⁵⁴

As indicated in the previous paragraphs and re-iterated in the above statement, the UK seems to have substituted an evolving State tradition with the traditional concept of the Crown. However, the problem is that, as opposed to the concept of the State, the Crown has never been systematically cultivated as a self-standing legal or juridical concept. Over time and especially due to the constant growth of the public law domain in the United Kingdom, this has increasingly caused problems.²⁵⁵ The Crown's perennial presence within the structure of the British government therefore raises the question whether, and if so to what extent, the Crown is capable of providing an alternative to the State as a legal concept. Is it therefore feasible in the context of our study on State liability in the European Union to use the Crown as a synonym for the State?²⁵⁶

Over time the use of the Crown as a synonym for the State has encountered an increasing number of obstacles and occasionally even provided a poor substitute for the concept of the State. The reasons for this lie partly in the historical fact that in the UK the monarchical structure of government had missed out on drawing a clear distinction between the 'private' and the 'public' sphere of the Sovereign's responsibilities. As a result, it foreclosed the development of a separate body of public law.²⁵⁷ Overall, the formation of the British State is to a large extent a political achievement, which never seems to have been equally recognized in law. Essentially, the idea of the State remains invisible within the legal framework of government in England.²⁵⁸ The judiciary has partly responded to this impasse by modifying and

²⁵⁴ COLIN TURPIN, *British Government and the Constitution: Text, Cases and Materials*, 5th ed. (London, Butterworths, 2002), p. 137.

²⁵⁵ LOUGHLIN, "The State, the Crown...", *supra* note 243, p. 74.

²⁵⁶ *Ibid.*, p. 74.

²⁵⁷ Many scholars, in fact, lament the continued influence of ancient notions of the Crown and the apparent failure of English law to develop a coherent concept of the modern State. In this way, for example, Martin Loughlin argues that the framework of common law has not been forced to recognize the State or the particular characteristics of government; *Ibid.*, p. 33.

²⁵⁸ QUENTIN SKINNER, "The State" in T. Ball *et al.* (eds.), *Political innovation and conceptual change* (Cambridge/New York, Cambridge University Press, 1989), p. 126.

attenuating many of the traditional prerogative powers of the Crown.²⁵⁹ In accordance with these developments, the notion of the State under British law has to be discussed in light of the nature and the contemporary significance of the political traditions and the country's legal inheritance.²⁶⁰ It is therefore essential today to interpret the Crown within its present constitutional and political context and to follow Lord Reid's advice to "beware of looking at older authorities through modern spectacles."²⁶¹

A decisive factor which undoubtedly had significant influence on a "State-assimilated" interpretation of the Crown in the UK was the definition of the State as adopted under European Community law and especially in the case law of the CJEU, both of which are binding in the UK.²⁶² Consequently, it is not the domestic definition of the Crown that eventually prevails for the purposes of application under Community law, but it is in fact through EC law that the domestic courts in the UK were introduced to the juridical concept of the State. The incontrovertible fact that English courts have had to apply a particular pre-defined notion of the State as a legal concept in connection with EC law is vividly reflected in the domestic case-law. National courts have, for example, been directed towards a certain definition of the State for the purposes of the Community law doctrine of vertical direct effect in cases such as *Foster v. British Gas*,²⁶³ *Griffin v. South West Water Services Ltd*,²⁶⁴ and the *N.U.T* case.²⁶⁵

When it comes to the question of the liability of public bodies for damages, domestic courts will inevitably be confronted with the same task: namely to prove that the defendant is in fact an emanation of the State. In doing so, national courts could

²⁵⁹ LOUGHLIN, "The State, the Crown...", *supra* note 243, p. 33.

²⁶⁰ *Ibid*, p. 34.

²⁶¹ Case *Burmah Oil Co (Burma Trading) Ltd. v. The Lord Advocate* [1965] AC 75, 99.

²⁶² PAUL CRAIG, "The European Community, the Crown and the State" in M. Sunkin and S. Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford/New York, Oxford University Press, 1999), p. 322.

²⁶³ Case C-188/89, *A. Foster and others v. British Gas plc*. [1990] ECR I-3313.

²⁶⁴ *Griffin v. South West Water Services Limited* [1995] IRLR 15.

²⁶⁵ *National Union of Teachers v. Governing Body of St. Mary's Church of England (Aided) Junior School* [1997] IRLR 242.

either resort to Article 234 EC by referring a question for a preliminary ruling to the CJEU, or they could just decide the case on the basis of the existing case-law in light of the CJEU's jurisprudence on direct effect.²⁶⁶ A practical example of Community law providing a path-breaking interpretation concerning public sector arrangements in general and the Crown in particular was the case *Factortame Ltd. v. Secretary of State for Transport*.²⁶⁷ In this ruling, the CJEU seemed to imply that the Crown was simply to be equated with the British government. In fact, the Court stated that any liability imposed upon the State would have to be met by the government and that any liability imposed upon the government could be seen as a liability imposed on the State.²⁶⁸ Even though judicial pronouncements do not always provide unequivocal answers, it is clear from this case that the concept of the State was perceived to be closely connected to the Crown.²⁶⁹

Notwithstanding these terminological discrepancies and in light of the fact that the subsequent analysis will predominantly deal with questions of public liability, which is to be imposed on a legal person, references to the State hereinafter should, as far as the United Kingdom is concerned, be understood as references to the Crown. In line with the CJEU's ruling in *Factortame*,²⁷⁰ we will simply follow the logic of Carol Harlow in this context, who deliberately uses the term 'State' instead of 'Crown' in her work when discussing questions of State liability in the UK. She chooses to do so for the simple reason that "[t]he term 'state', in contrast to the familiar terminology of

²⁶⁶ CRAIG, "The European Community, the Crown...", *supra* note 262, p. 325.

²⁶⁷ See *R. v. Secretary of State for Transport, ex parte Factortame (no. 2)* [1991] 1 All ER 70 and Case C-213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and others* [1990] ECR I-2433.

²⁶⁸ C-213/89, *Factortame*, *supra* note 8, C-213/89, para. 13.

²⁶⁹ However, on precisely this point, Paul Craig demurs that the notion of the State that has been adopted under Community law is often triggered by the relationship between the purpose for which the meaning of the State is being sought and the legal test, which is actually produced. A vivid example of this phenomenon is the CJEU's judgment in C-188/89, *Foster v British Gas*, *supra* note 263, paras. 1-22, in which the Court conceptualized the State by means of the so-called 'Foster test'. In this context Craig hints at the fact that the definition attributed to the State on this occasion is not universally applicable, but is instead tailored to the precise ambit of the case. As in CRAIG, "The European Community, the Crown...", *supra* note 262, p. 325.

²⁷⁰ C-213/89, *Factortame*, *supra* note 8, paras. 1 *et seq.*

Crown and public authorities, possesses no technical, legal resonance for tort lawyers and carries little intellectual baggage, at least inside the domestic legal system.”²⁷¹

2. Absolute immunity of the Crown: the origins of the doctrine of judicial immunity in England

Given the complex legal situation we encounter with respect to the Crown in the UK, the key issue of this chapter, which is the principle of non-contractual liability for breaches of law committed by public authorities, also anticipates an exceptional starting-point for analysis. Whereas the concept of the British Crown is almost unique in the comparative context, the strict form of State immunity for judicial breaches of law, which still prevails in the UK, is a representative example of an entire category of national legal systems that encompass a similarly restrictive approach towards State liability.²⁷²

a) Absolute Crown immunity and ministerial non-immunity?

“The King can do no wrong” is a principle that has for centuries played a decisive role in many countries, among them France, Italy and the UK. Underwritten by the idea of sovereignty, the law excluded or seriously limited liability claims against the State and its officials, including the judiciary, brought by individuals who had suffered harm caused by a State action. At the time, the legal standing of an individual was marked not only by the complete absence of a right to redress against the Sovereign, but also by the fact that he or she had no right to redress for damage caused by a subject acting under the authority of the Sovereign.²⁷³ In the case of Britain the historical context is especially relevant as it is only by looking at the legal history that one can understand the unprecedented protection granted towards the judicial branch in the United Kingdom to this day. The maxim of the Crown’s absolute immunity from suit dominated British legal thought until the second half of

²⁷¹ CAROL HARLOW, *State liability: Tort law and beyond* (Oxford, Oxford University Press, 2004), p. 1.

²⁷² An equally restrictive regime we encounter, *inter alia*, in the Netherlands and in Ireland. See graph on p. 168 for a comprehensive overview of all the EU Member States contained in group I.

²⁷³ CORNFORD, “Legal Remedies...,” *supra* note 249, p. 235.

the twentieth century and fostered the belief that the concept of State responsibility for judicial breaches was simply irreconcilable with the concept of sovereignty.²⁷⁴

The dictum that the King or Queen as the foundation of justice could do no wrong also implied that no court could exercise jurisdiction over him or her. In his writings, Blackstone portrayed the situation in a slightly overblown manner when he stated that “[t]he King [...] is not only incapable of doing wrong, but even of thinking wrong: he can never mean to do an improper thing: in him there is no folly or weakness.”²⁷⁵ The rule of the Crown’s infallibility adheres to the group of customary authority, privilege and immunity vested in the monarch, which altogether form the Crown’s legal prerogatives. These royal prerogatives furnish the Crown with wide-ranging legal immunities and privileges, as well as some unique powers.²⁷⁶ Likewise, they were traditionally the Crown’s pillars of governance.²⁷⁷ Over time, however, the wide scope of immunity once attached to the Crown was gradually alleviated. Albeit in principle not subject to parliamentary scrutiny, Parliament has occasionally intervened in the Crown’s prerogatives through various statutes and most notably in the Crown Proceedings Act 1947.²⁷⁸ Consequently, a fair proportion of the traditional prerogatives have by now been put on a statutory basis.

The principle of absolute Crown immunity also embraced the executive power of the Crown, which consisted of representative and responsible ministers and

²⁷⁴ The expression ‘Crown immunity’ as used in this context is not to be confused with Crown immunity in the understanding of immunity from Acts of Parliament. The Crown’s inherent immunity from suit is something rather different from the Crown’s immunity *vis-à-vis* the Parliament. The latter concept, which has by now been abolished, implied that an Act of Parliament did not bind the Crown or its servants unless it explicitly said so. WADE, “The Crown, Ministers...,” *supra* note 247, p. 25. See also MARCEL STORME, “The liability of the state for failing to provide access to Justice” in T. Andersson and B. Lindell (eds.), *Festschrift till per Henrik Lindblom* (Uppsala, Iustus Förlag, 2004), p. 651.

²⁷⁵ BLACKSTONE, Sir William, *Commentaries on the Laws of England, Vol. I* (Oxford, Clarendon Press, 1768), p. 239.

²⁷⁶ CLERK, *Torts*, *supra* note 172, pp. 142 as well as WADE, “The Crown, Ministers...,” *supra* note 247, p. 23.

²⁷⁷ See, *inter alia*, RODNEY BRAZIER, “Constitutional Reform and the Crown” in M. Sunkin and S. Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford/New York, Oxford University Press, 1999), p. 344.

²⁷⁸ Henceforth also referred to as “CPA 1947”.

subordinate officers acting in the name of the Crown. Since all government departments qualified as agencies of the Crown, they, as an entity, could not be held legally accountable for any wrongful act which had caused harm to individuals. As 'Her (or His) Majesty's Government' was acting on the basis of a set of royal acts, the executive at first remained immune from legal accountability. Due to the fact that the law did not identify or recognize 'the government' of 'the State', there was simply no concept of official responsibility for government acts. However, on a separate level attempts were made to mitigate the privilege of immunity of the entire governmental body. In the end the Crown's immunity was only tolerable because it did not shield the Queen's ministers and Crown officers from bearing personal responsibility in law for anything unlawful they did. Therefore, it made no difference whether the officers were acting in an official capacity or not. In fact, ministers of the Crown enjoyed none of the immunities that were granted to the Crown. Furthermore, no veil of immunity, not even the orders of the Crown itself, could absolve them from obeying the law. Maitland felicitously summed up the situation by stating that "[w]e can hardly lay too much stress on the principle that though the King cannot be prosecuted and sued, his ministers can be both prosecuted and sued, even for what they do by the King's express command."²⁷⁹

As outlined above, within this system of liability, which prevailed until 1947, the rule of law was the predominant overarching maxim.²⁸⁰ The distinction between the Crown's immunity and its servants' non-immunity was a highly artificial but necessary device to reconcile the imperative immunity of the Sovereign with the rule of law. In order to ensure the co-existence of the Crown's immunity with the non-immunity of its officers, basic constitutional logic demanded that the legal personalities of the Crown and those of the Crown officers should be kept distinct. As one author described it, since English law had failed to produce a coherent theory of the State, the situation had been rendered acceptable only by a compromise of

²⁷⁹ MAITLAND, *The constitutional history of England*, *supra* note 252, p. 484 as in CORNFORD, "Legal Remedies...", *supra* note 249, p. 237.

²⁸⁰ See WILLIAM WADE and CHRISTOPHER FORSYTH, *Administrative law*, 9th ed. (Oxford/New York, Oxford University Press, 2004), pp. 824-25.

absolute Crown immunity and the non-immunity of its servants.²⁸¹ However, this unsatisfactory state of affairs was eventually resolved in 1947.

b) The Crown Proceedings Act 1947

i) Vicarious liability of the Crown

On a provisional timeline the doctrine of Crown immunity could be separated into three different periods demarcated by two distinct milestones. First is the period of absolute Crown immunity before the CPA 1947; the second is the period after the enactment of the CPA, but before the House of Lords' ruling in the case *M v. Home Office*²⁸² in 1993; and the third is the situation since *M v. Home Office*.²⁸³ Thus, during the first period prior to the enactment of the CPA 1947 the situation as far as civil wrongs were concerned could be summarized as follows: as long as the plaintiff sued the actual wrongdoer or the person who ordered the wrongdoing, he or she could easily bring an action against Crown officials personally, even if they had been acting in their official capacity at the time when they committed the alleged tort. Hence, Crown servants were not able to hide behind the Crown's veil of immunity.

The inception of modern State liability in Britain is to be found – rather surprisingly for representatives of theories adhering to the divisive elements of the common law versus the civil law tradition – in a statutory provision, namely the Crown Proceedings Act 1947. The CPA 1947 for the first time drastically reduced the Crown's hitherto absolute immunity from legal process and eventually opened up the possibility of holding the Crown liable in tort, contract and certain other areas.²⁸⁴

²⁸¹ Martin Loughlin in WADE, "The Crown, Ministers...", *supra* note 247, p. 31.

²⁸² *M*, *supra* note 250, 537a *et seq.*

²⁸³ In a similar manner CORNFORD, "Legal Remedies...", *supra* note 249, pp. 233 *et seq.*

²⁸⁴ For the sake of completeness it should be pointed out that before the CPA 1947, under the principle of absolute Crown immunity the situation had been mitigated, in that rights could be established against the Crown by bringing a Petition of Right or, in the case of an action in tort when a Petition of Right was not available, by bringing an action for damages against the servant of the Crown responsible for the tort in his own name. However, the remedy was as of grace, signified by the *fiat* of the Attorney-General. In particular, the CPA eventually opened up those areas, which were formerly covered by the Petition of Right; W. V. H. ROGERS, *Winfield and Jolowicz on Tort*, 17th ed. (London, Sweet &

Thus, the CPA largely removed the pre-existing “lacuna in the rule of law”.²⁸⁵ Notwithstanding a few exceptions, according to the CPA the Crown could be held liable in respect of torts committed by its servants or agents.²⁸⁶ Thereafter, the action was generally to be brought against the relevant government department.²⁸⁷

From the previous discussion on the conceptual interrelation of the Crown with a potentially State-assimilated structure, we can therefore deduce that any act against the Crown as an entity could be interpreted as an act against the State, which would have to be defended by the British government as the Crown’s executive power. Under the CPA any liability imposed upon the State would have to be met by the government and conversely, any liability imposed upon the government could be regarded as responsibility imposed upon the State. In this manner, the CPA assimilated the civil liability of the Crown to that of a private individual by equating the Crown in terms of tortious liability with a private person of full age and capacity.²⁸⁸ Even though the Crown was from then on placed in the position of an ordinary litigant, the continuing idiosyncrasies of Crown liability render the situation much more complex than that of an ordinary litigant and demonstrate that further explanation is required in this context.

As regards the precise content of the CPA 1947, it suffices here to present the general structure of the Act.²⁸⁹ Part I of the CPA dealing with collective matters of ‘substantive law’ confers the general right to take proceedings against the Crown as of right and without Her Majesty’s *fiat* in cases where, before the enactment of the CPA,

Maxwell, 2006), pp. 1026 *et seq.* and PAUL CRAIG, *Administrative Law*, 5th ed. (London, Sweet & Maxwell, 2003), pp. 919-921.

²⁸⁵ As in WADE, “The Crown, Ministers...,” *supra* note 247, p. 27. See also CLERK, *Torts*, *supra* note 172, pp. 143-144.

²⁸⁶ S. 2(1) CPA 1947.

²⁸⁷ S. 17 CPA 1947. See also WADE and FORSYTH, *Administrative law*, *supra* note 280, pp. 824-25.

²⁸⁸ Section 2(1) of the CPA 1947 states that “the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject.” On this point see also ROGERS, *Tort*, *supra* note 284, pp. 1027 *et seq.* and LOUGHLIN, “The State, the Crown...,” *supra* note 243, pp. 60-61.

²⁸⁹ We will later focus in detail on those provisions of the CPA 1947, which are most relevant for the topic of this research. For a full-text version of the CPA 1947 see ANDREW DAVIES (ed.), *Halsbury’s Statutes of England and Wales*, Vol. 13, 4th ed. (London, Butterworths, 2000), pp. 9-38.

the claim could have been enforced by Petition of Right or under any of the statutory provisions replaced by the Act.²⁹⁰ Section 2 discusses permissible actions against the Crown under the CPA and refers to torts committed by Crown servants or agents for any breach of their duties giving rise to tortious liability. However, the CPA throughout carefully distinguishes between the Crown on the one hand and its officers on the other.²⁹¹ Accordingly, section 2 does not remove the right of a harmed individual personally to sue the actual tortfeasor. The law relating to indemnity, contribution and contributory negligence is regulated in section 4.²⁹² In summary, under the CPA, the Crown was *ex tunc* generally liable in tort within the limits of this Act.²⁹³

ii) Procedural questions

Generally speaking, the CPA relates to civil proceedings against the Crown and hence replaced the special forms of procedure previously governing such actions. Part II of the CPA deals in a collective manner with issues related to “jurisdiction and procedure” and proclaims that civil proceedings by or against the Crown are subject to the provisions of the Act and are to be instituted and proceeded with in accordance with the rules of court.²⁹⁴ According to section 17, the Minister responsible for the Civil Service – usually the Prime Minister of the day – has to publish a list of authorized government departments for the purposes of the Act. With reference to this

²⁹⁰ Right to sue the Crown in s. 1 CPA 1947: “Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty’s fiat, by Petition of Right, or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act.”

²⁹¹ Only in one place the CPA had to deal with them together, namely in s. 21(2), which prohibits the granting of any injunction or order against an officer of the Crown if the effect would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown. This means that where the power belongs to the Crown itself, the Crown’s immunity remains intact and cannot be evaded by suing the Crown officers. But where the power is conferred on a minister in his or her own name, the Act in no way affects this ministerial non-immunity. The same logic applies to injunctions, just as much as to any other species of order. On this aspect see WADE, “The Crown, Ministers...,” *supra* note 247, p. 27.

²⁹² DAVIES (ed.), *Halsbury’s Statutes* (2000), *supra* note 289, pp. 14 *et seq.*

²⁹³ Commentary on s. 2 CPA 1947 see *Ibid*, pp. 12-13.

²⁹⁴ Sections 13 and 15 CPA 1947.

list, civil proceedings against the Crown are to be instituted against the appropriate authorized government department. If none of the authorised government departments is suitable for the claim, it should be brought against the Attorney General.²⁹⁵ Moreover, in case the applicant is in doubt which government department he or she should proceed against, proceedings may be initiated against the Attorney General, who will subsequently apply to have the name of the correct department substituted.²⁹⁶

In terms of jurisdiction, proceedings by or against the Crown are to be held in the High Court (section 14 of the Act), unless the court, with the consent of the Crown, orders otherwise. If proceedings are instituted against the Crown in a county court and the Attorney General certifies that those proceedings involve an important question of law or may be decisive in other cases, then the proceedings must be removed to the High Court, which may take such removal into account when awarding costs. Otherwise the ordinary rules concerning the transfer from or to the county court are binding also on the Crown.²⁹⁷ Finally, part III and part IV of the CPA 1947 relate to “judgments and execution” by or against the Crown (ss. 24-27) and deal with miscellaneous and supplemental matters respectively (ss. 28-40).²⁹⁸

Notwithstanding the removal of the Crown’s immunity and its exposure to wide-ranging tort, contract and other liabilities, the CPA 1947 also contains certain public acts which are entirely excluded from the ambit of vicarious liability of the Crown. Among others, section 2(5) marks a rather significant exception in this respect. In fact, this provision had important implications for the question of the Crown’s liability regarding acts performed by its judges, magistrates or constables as it explicitly shielded any action by the judiciary from proceedings by virtue of the

²⁹⁵ s. 17(3) CPA 1947.

²⁹⁶ ss. 17 and 18 CPA 1947.

²⁹⁷ s. 20 CPA 1947. See also DAVIES (ed.), *Halsbury’s Statutes* (2000), *supra* note 289, p. 2 and pp. 20-21.

²⁹⁸ Part V of the Act deals with the CPA’s application to Scotland (ss. 41-51) and part VI is entitled “Extent, Commencement, Short Title, & C.” (ss. 52-54). *Ibid*, pp. 34-35.

CPA 1947.²⁹⁹ In view of such far-reaching exceptions as in section 2(5), the question naturally arises as to whether the CPA truly lived up to its initial intention and purpose of removing the infamous “lacuna in the rule of law”,³⁰⁰ which had so long been criticised in the doctrine. In fact, various authors - among them Sir William Wade - lamented that to secure immunities for certain Crown officers through special provisions in the CPA was to re-enforce such lacunae, not to erase them.³⁰¹ In an attempt to get a clearer picture of the prevailing situation in the UK, the following analysis will therefore focus especially on those immunities which were preserved even after the enactment of the CPA. Accordingly, special attention will be devoted to the issue of lasting and absolute immunity of all Crown officials pertaining to the judicial branch.³⁰²

c) The *Town Investments* case and the decision in *M v. Home Office*

Even after the enactment of the CPA of 1947, the legal nature and the position of the Crown, as well as the liability of ministers and Crown officers, have been the subject of some remarkably contradictory judicial opinions.³⁰³ Generally speaking, these were basic questions of constitutional law, which in principle ought to be clear and well-settled in any national legal system. However, as mentioned before, in the UK it appears at times that the closer it comes to core constitutional questions, the less certain judges seem to be.

²⁹⁹ Section 2(5) CPA 1947: “No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.” See also CLERK, *Torts*, *supra* note 172, p. 147.

³⁰⁰ WADE, “The Crown, Ministers...,” *supra* note 247, p. 27.

³⁰¹ *Ibid*, p. 27. See also CLERK, *Torts*, *supra* note 172, p. 147.

³⁰² For a detailed analysis of the principle of absolute judicial immunity see section 3(b)(ii) of this chapter.

³⁰³ See, for example, the first ruling in the *Factortame* litigation in 1990, in which the Crown counsel stated that officers of the Crown were immune from suit before the passing of the Crown Proceedings Act and that the Act intended to continue that immunity (*R. v. Secretary of State for Transport, ex parte Factortame (no. 1)* [1990] 2 AC 85, 120). For an overview on the different perceptions of the Crown in the literature and in the jurisprudence over time see SUNKIN and PAYNE, “The Nature of the Crown...,” *supra* note 240, pp. 1-21.

In its function as a court of final instance the House of Lords has had a significant influence on the development of an advanced interpretation of the Crown and its responsibilities, as well as on the modification of the Crown officers' status with respect to questions relating to liability for harmful acts pursued in the course of their official functions. Two judgments deserve special attention in this context. Even though more than 15 years apart, these significant judicial dicta significantly contributed to shaping the legal standing of the Crown before the domestic courts. Moreover, they also clarified the status of the Crown officers and the possibility of holding them personally and/or the Crown liable for harm caused to individuals during the exercise of their official functions. These two cases, which interestingly enough differ fundamentally regarding their respective outcomes, are nevertheless closely linked in terms of content. Moreover, both rulings are milestones with respect to the continued development of the legal perception of the Crown after the CPA 1947. Furthermore, these cases also signal the repeated efforts in the jurisprudence to create a timelier definition of 'the government' in England. Barring the success of these various attempts, the development of the Crown's perception after the CPA 1947 is ostensibly mirrored in the *Town Investments* case³⁰⁴ of 1978 and the judgment of the House of Lords in *M v. Home Office* 1994.³⁰⁵

i) Town Investments Ltd. v. Department of the Environment

The *Town Investments* case stirred up discussion of the legal standing and the definition of the Crown and its officers in the context of a public lease agreement. In this case the Court of Appeal had ruled that a lease of premises to the Department of the Environment did not formally constitute a lease to the Crown, but that instead it was to be classified as a lease held by the Secretary of State. Furthermore, the Court of Appeal had declared in the same judgment that a specific phrase in the lease agreement stating that the Secretary of State was in fact a party to the lease "for or on

³⁰⁴ *Town Investments*, *supra* note 245, 813a *et seq.*

³⁰⁵ *M*, *supra* note 250, 537a *et seq.*

behalf of Her Majesty”³⁰⁶ merely indicated that the Secretary of State was acting in the “corporate capacity” of a minister.³⁰⁷

On appeal, the House of Lords overturned the decision by introducing a different basis for its reasoning. At the outset, Lord Diplock clarified in his speech that it was in fact not private law, which applied in the given circumstances, but “public law that governs the relationships between Her Majesty acting in her political capacity, the government departments [...], the ministers of the Crown [...] and civil servants of all grades who are employed in those departments.”³⁰⁸ Furthermore, Lord Diplock underlined that in reality the concept of the Crown was a fictional construct and that confusion could be avoided “if instead of speaking of ‘the Crown’ we were to speak of ‘the government’.”³⁰⁹ In fact, he went on to argue that the term ‘government’ should be used “to embrace both collectively and individually all of the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of the government is carried on by civil servants [...]”.³¹⁰ Therefore, acts undertaken by this closely defined group, including - like in the present case - the Secretary of State, were to be regarded as acts of the Crown. Overall, Lord Diplock reiterated that the notion of the Crown, as employed in the present context, constituted a legal fiction under public law.³¹¹

The majority of the law lords supported Lord Diplock’s legal reasoning, which stipulated that from a legal perspective the Crown technically had to be regarded as a corporation sole. At the same time, according to his speech, this concept was to be viewed as a term of art and had to be recognized as a legal fiction under public law. Thus, the Crown was to serve as a synonym for “the government” as an institution.³¹²

³⁰⁶ *Town Investments*, *supra* note 245, 813 *et seq.*

³⁰⁷ *Ibid*, 817e-g.

³⁰⁸ *Ibid*, 817h.

³⁰⁹ *Ibid*, 818b.

³¹⁰ *Ibid*, 818c.

³¹¹ *Ibid*, 818c-d. See also LOUGHLIN, “The State, the Crown...,” *supra* note 243, p. 63.

³¹² *Town Investments*, *supra* note 245, 818b; LOUGHLIN, “The State, the Crown...,” *supra* note 243, p. 63.

In addition to Lord Diplock's reasoning, Lord Simon also argued in the same case that the Crown included *prima facie* all ministers and central government officials. In his speech, however, the Crown constituted not a corporation sole, but a corporation aggregate.³¹³ Both of the above models attempted to develop a legal phraseology in order to define 'the government' in Britain in a conclusive manner by vesting the Crown with the fictional construct of a corporation. The question whether starting, from the ruling in *Town Investments*, the courts indeed succeeded in developing a more timely legal concept of the government in the United Kingdom, cannot be fully answered in the affirmative. Even after the ruling in *Town Investments* a host of questions concerning the Crown still remained unanswered.

However, one has to acknowledge that in many respects over time and particularly in this specific ruling the courts have managed to partly divest the Crown of its exalted status. In fact, judges have started to dismantle the Crown's absolute immunity in a piecemeal fashion and this behaviour seems to be a continuing trend.³¹⁴ Generally speaking, the status of the Crown has been notably diminished as a consequence of the development of public law in the UK. In a 1995 judgment³¹⁵ Lord Mustill perceived the gradual occurrence of this phenomenon as necessary. He argued that in order to

avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago.³¹⁶

It is especially in the area of judicial review that the Crown was gradually divested of its absolute immunity.

³¹³ *Town Investments*, *supra* note 245, 833d-e.

³¹⁴ For example, the review of prerogative powers, the court's power to override a claim of Crown privilege, following development with respect to Community law, stipulating that the court has jurisdiction to make coercive orders against ministers of the Crown (as in *M*, *supra* note 250, 537)

³¹⁵ *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union and others* [1995] 2 All ER 244, 256-268 (Lord Mustill, dissenting).

³¹⁶ *Ibid*, 268.

ii) The judgment in M v. Home Office

More than fifteen years after the House of Lord's ruling in *Town Investments*, a revised framework of public liability for governmental acts was set up in 1993 in the landmark decision in *M v. Home Office*.³¹⁷ However, the case by case approach taken up by the law lords established a scheme which retained the distinction between the Crown and its servants and preserved the classical view that was rooted in the principle that the King could do no wrong. Opinions on the true outcome of this ruling were manifold and not always supportive. Loughlin even went as far as to declare the judgment a mere attempt to "refashion public law while retaining intact an unreconstructed core."³¹⁸ What significance did the judgment really have for the overall governmental structure in Britain? Was *M v. Home Office* a missed opportunity to resolve the distortions, which existed with respect to the concept of the State that had originally been generated by British history? And did the law lords' ruling in the case truly forestall the development of a modern conception of the State in Britain?

In a nutshell, the substance of the case revolved around court proceedings, which were brought on behalf of an applicant against the Home Secretary on an allegation of contempt of court. The applicant, a citizen of Zaire, had claimed political asylum in the United Kingdom in 1990. The claim was subsequently rejected by the Secretary of State, who then also ordered the applicant's removal from the UK. The day of M's removal an application for leave to move for judicial review was lodged. Despite the judge's subsequent order not to remove M from the UK pending further hearing, the Home Office nevertheless put M on a flight back to Zaire. Hereinafter, proceedings were brought against the Secretary of State on behalf of the applicant.³¹⁹

³¹⁷ *M*, *supra* note 250, 537 *et seq.*

³¹⁸ LOUGHLIN, "The State, the Crown...", *supra* note 243, p. 73.

³¹⁹ For the factual details involved in the case, see CORNFORD, "Legal Remedies...", *supra* note 249, pp. 257 *et seq.* See also the judgment in *M*, *supra* note 250, 537 *et seq.* and the decision of the Court of Appeal in *M. v. Home Office and another* [1992] 4 All ER 97.

According to *M*, the Secretary of State had allegedly failed to comply with an undertaking and a judge's order while it was in force. Hence, the question was whether contempt of court proceedings could actually be brought against the Crown. The Court of Appeal had held that since the Crown itself was a legal fiction under public law, neither the Crown nor the Home Office had sufficient legal personality to be the subject of contempt proceedings. In its judgment the Court of Appeal declared that in principle the Home Office could never be guilty of contempt since neither the Crown nor the government departments were subject to the contempt jurisdiction of the courts, but only the ministers and civil servants personally.³²⁰ Consequently, in this particular case the Court concluded that the Secretary of State was guilty of serious contempt.³²¹

The House of Lords dismissed the Secretary of State's appeal. In conformity with the Court of Appeal's judgment,³²² the House of Lords concluded that "the Secretary of State had properly been found to be in contempt" of court.³²³ Furthermore, the Law Lords declared that in the course of judicial review proceedings the court did have jurisdiction to make coercive orders against ministers and when they acted in disregard of such orders, the court had the power to make a finding of contempt. Such finding would be applicable "not against the Crown directly, but against a government department or a minister of the Crown in his official capacity."³²⁴ Recalling the decision in *Town Investments*, which had broadly subsumed public officers under the Crown's veil of absolute immunity, the case of *M v. Home Office* changed this position drastically. In fact, the decision established the power of the British courts to subject Crown officers acting in their official capacity to public law remedies. This included the possibility to grant injunctive relief and to find ministers guilty of contempt if they disobeyed such orders. At the same time,

³²⁰ See Court of Appeal in *M.*, *supra* note 319, 538a-g.

³²¹ *M*, *supra* note 250, , 538.

³²² Court of Appeal in *M.*, *supra* note 319, 97 *et seq.*

³²³ *M*, *supra* note 250, 538 *et seq.*

³²⁴ *Ibid*, 566d.

however, the doctrine of absolute immunity of the Crown from legal process remained fully intact.³²⁵

In light of the complexity of all the developments after the CPA 1947 and for purposes of clarification, it appears necessary at this point to outline briefly the *status quo* after the House of Lord's judgment in *M v. Home Office*. Where have all these developments since the CPA 1947 eventually left us? No attempt will be made to summarize the entirety of the preceding discussion. The present position can be conveyed quite simply: there is a clear distinction between the two meanings attributed to the Crown, which is the monarch on the one hand and the entire administrative branch on the other. This distinction also has significant implications with respect to the Crown's liability since it results either in the total immunity of the monarch acting in his/her personal capacity or in the far-ranging liability of the Crown as an executive body.³²⁶ Even though much confusion has been cleared away by the House of Lords ruling in *M v. Home Office*,³²⁷ there are still contradictions and loose ends, which future judgments may have to sort out.

Opinions are also divided over the question as to whether, in light of the decision in *M v. Home Office*, the concept of government *vis-à-vis* the notion of the Crown had been resolved conclusively. On the one hand, it appears that the decision succeeded at least in drawing a more concerted line of demarcation between the Crown's executive and personal functions. This could be interpreted as a further step towards the legal recognition of the notion of government in the UK. Accordingly, as argued by Wade and Forsyth, the introduction of the concept of personal liability of public officials succeeded in reconciling the principle of strict adherence to the rule of law with the traditionally protected status of the Crown.³²⁸ Citizens should be able to obtain legal redress whenever public powers have been exercised wrongly. In the UK, domestic law had come ever closer to this ideal and in fact, the decision in *M v. Home*

³²⁵ See CORNFORD, "Legal Remedies...", *supra* note 249, p. 233.

³²⁶ In this sense also Opinion Lord Templeman in *M*, *supra* note 250, 540 *et seq.*

³²⁷ *Ibid*, 537 *et seq.*

³²⁸ See WADE and FORSYTH, *Administrative law*, *supra* note 280, pp. 824-25.

Office almost brought this process to completion.³²⁹ After all it was an artificial construct which sought to set in place the framework of official liability for governmental acts in the UK. But did it truly resolve the pivotal questions concerning the defining characteristics of the Crown?

In fact, part of the literature claims that the judgment in reality evaded the central concern of finding a clear defining line between the legal status of the Crown on the one hand and that of the Crown's servants on the other. Moreover, *M v. Home Office* was seen as a lost opportunity of not only differentiating the concept of the Crown from the personality of the monarch, but also of articulating a concept of the Crown as both a corporation aggregate standing for the community and as an executive body known as the government. In addition to that, the judgment had failed to establish a framework of official liability for acts of the Crown. This is also mirrored in Lord Woolf's speech in *M v. Home Office* where he declared that even though "in the theory which clouds this subject the distinction is of greatest importance", there was no need to insist on this definition in the current case since it was "of no practical significance".³³⁰ It is precisely this lack of legal precision in the Court's reasoning, which was denounced by critics of the decision. One of those critical voices, Martin Loughlin, asserted that besides the appraisal of *M v. Home Office* as "the most important case in constitutional law for the past 200 years and more," the judgment in fact missed out on the opportunity to carry through the preparatory work, which had been undertaken in *Town Investments*. Loughlin deplored the fact that the Court "failed to develop further a legal concept of the State and to set in place a modern framework of official liability for governmental action."³³¹ Hence, he concluded that the judgment was "indicative of an attempt to

³²⁹ In this context Tom Cornford identified four different capacities in which a Crown officer may be subject to legal proceedings: (1) As an officer of the Crown simpliciter, (2) acting as a *persona designate*, (3) acting in a personal capacity or (4) acting as an officer liable in a representative capacity. This can be contrasted to cases when the officer acts in his official capacity or acts as an officer of the Crown, expressions which are apt to cover both the case, in which an officer acts as an officer of the Crown simpliciter, and the case, in which he acts as a *persona designata*. Apart from the expression "officer of the Crown simpliciter" all the aforementioned concepts used by Cornford can be found in existing case law, legislation or legal commentary. See CORNFORD, "Legal Remedies...", *supra* note 249, p. 234.

³³⁰ *M*, *supra* note 250, 551b.

³³¹ LOUGHLIN, "The State, the Crown...", *supra* note 243, pp. 73 *et seq.*

refashion public law while retaining intact an unreconstructed core.”³³² All that would have been necessary, Loughlin concluded, was that the traditional notion that ‘[t]he king can do no wrong’ be separated from the understanding of the Crown as an executive body or as the government.³³³

To conclude, it should be underlined that until today the Crown is, as it has always been, immune from legal process at common law. From the feudal court structure until now and in line with the overarching principle that ‘[t]he King can do no wrong,’ there is still no court in the UK which could try the Queen. It was on these premises that the Crown’s immunity had been recognised in *M v. Home Office* by Lords Templeman and Woolf.³³⁴ As far as tort, contract and analogous claims were concerned, the Crown’s immunity had been largely abolished by the Crown Proceedings Act 1947, but nevertheless still remained in place in some respects.³³⁵ In fact, the CPA merely removed the Crown’s immunity regarding civil proceedings, but did not include public law litigation or the process of judicial review.³³⁶ The crucial question thereafter was whether the same immunity also extended to servants of the Crown, including ministers. This issue was finally addressed in the case *M v. Home Office*. The judgment overruled the House of Lords’ ruling in *Town Investments*, to the extent that it had implied that the concept of the Crown - in its fictional disguise as a “corporation aggregate”³³⁷ - also embraced all the ministers and Crown officials under its umbrella of immunity.

Put briefly, the current situation is that all officers of the Crown, whatever the source of their power, are amenable to the remedies available under judicial review. On the basis of this assertion:

³³² Ibid, p. 73.

³³³ Ibid, p. 75.

³³⁴ *M*, *supra* note 250, 541 *et seq.*

³³⁵ SUNKIN and PAYNE, "The Nature of the Crown...", *supra* note 240, p. 13.

³³⁶ s. 21; s. 38(2) CPA 1947: "[...] 'Civil proceedings' includes proceedings in the High Court or the county court for the recovery of fines or penalties, but does not include proceedings on the Crown side of the King's Bench Division."

³³⁷ Lord Simon in *Town Investments*, *supra* note 245, 830g-834d.

[t]he doctrine that the king cannot be sued in his own courts would apply only to the monarch in person and not the Crown as a political entity and the archaic and arcane distinctions formerly employed by the courts in their efforts to hold the executive to account could be allowed to wither away.³³⁸

3. Crown liability in tort: vestiges of immunity

In the UK, apart from the concept of the Crown, we are confronted with yet another legal particularity in the field of non-contractual liability, which is not found in most other EU Member States (with the exception of Ireland). This is the common law concept of ‘tort’. Consequently, before finally delving into the details of the public liability regime in the UK, the concept of tort law should briefly be outlined.

a) The concept of tort in the United Kingdom

With respect to questions of liability, UK law has adhered to the Roman law tradition by retaining specific heads of tortious liability. This implies that an action for damages against a public authority for wrongdoing must fall within one of the diverse and varied torts. Unlike in French or German law, tort law in England and Wales is not to be found under a civil code heading or even in a specific piece of legislation. Despite some rare exceptions, tort law has remained the province of the common law. British law simply does not have statutory principles on non-contractual liability, neither under civil law nor in relation to public authorities. Instead, liability is based on a number of specific torts, each of which has its particular scope and its own rules. The traditional torts range from various forms of trespass to chattels and specific economic torts, such as fraud or deceit, inducing breach of contract, conspiracy, intimidation and others.³³⁹ Each tort has separate requirements, which have to be

³³⁸ See CORNFORD, "Legal Remedies...", *supra* note 249, p. 14. In conformity with this dictum, the CPA 1947 states in its s. 40(1) that: "Nothing in this act shall apply to proceedings by or against, or authorize proceedings in tort to be brought against, His Majesty in His private capacity."

³³⁹ For a general and updated overview on the various forms of tort and their application under British law see for example SIMON DEAKIN *et al.*, *Markesinis and Deakin's Tort Law* 6th ed. (Oxford, Clarendon Press, 2008) as well as MARK LUNNEY and KEN OLIPHANT, *Tort Law: Text and Materials* 3rd ed. (Oxford, Oxford University Press, 2008).

satisfied in order to give rise to liability. The attendant risk that some interests may remain unprotected has been greatly reduced over time, mainly through the evolution of the tort of negligence into an independent ground of tortious liability. Negligence has now become the most general and, in practice, also the most important tort.³⁴⁰

Generally speaking, every legal system has to decide on a conceptual foundation for damages liability with respect to public bodies. In the UK the basic premise is that a public body that acts *ultra vires* is liable in tort if a cause of action can be established. However, the rationale is that an *ultra vires* act *per se* will not give rise to liability for damages. In addition, the claim has to correspond to one of the recognised private law causes of action as summarised above.³⁴¹ Consequently, in the UK there is neither a general principle of liability for damages nor a separate body of law dealing with actions for damages against public bodies. It is on the claimant to show that the facts of his/her claim lie within one of the established heads of tort. Thereby, UK law subjects the conduct of public authorities to the same tort rules as those that apply to any natural or legal person.³⁴² Due to the specific nature of activities generally performed by public authorities, this nevertheless results in a concentration of actions against them in a number of specific torts. The various torts create varying degrees of liability depending on the amount of discretion the public body possesses as well as the seriousness of the fault and the nature of the interest affected.³⁴³

In *X and Others (Minors) v. Bedfordshire*, Lord Browne-Wilkinson listed three different causes of action that could be relied upon against a public body. Those were first, breach of statutory duty, second, common law negligence and last but not least,

³⁴⁰ WALTER VAN GERVEN *et al.*, *Tort Law: Scope of Protection* (Oxford, Hart Publishing, 1998), p. 16.

³⁴¹ See CRAIG, *Administrative Law*, *supra* note 284, p. 881.

³⁴² The only noteworthy exception is the tort of misfeasance in public office, which was recognized by the Privy Council in *David v. Abdul Cader* [1963] 3 All ER 579, PC. VAN GERVEN *et al.*, *Tort Law*, *supra* note 238, p. 346; The tort of misfeasance is “the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful” as in *X (minors) v. Bedfordshire County Council* [1995] 3 All ER 353, 355g.

³⁴³ VAN GERVEN *et al.*, *Tort Law*, *supra* note 238, p. 44.

misfeasance in public office.³⁴⁴ Out of these three causes of action the two torts of negligence and breach of statutory duty form the grounds on which tortious liability of public authorities is most commonly based in the UK.³⁴⁵ However, over time the list established in *X and Others (Minors) v. Bedfordshire* expanded so that by now we have to add two additional causes of action to it, which are the cases of breach of European Community law on the one hand and the violation of the specific duties placed on public authorities by the Human Rights Act 1998 on the other.³⁴⁶

Some authors have argued that the large number of special rules governing the liability of public authorities produce, in effect, a separate body of law.³⁴⁷ However, in reality, a large part of these rules focus mainly on granting special immunity to particular public functions, which may or may not be performed by a public authority, rather than granting protection to the public authority as such. Indeed, one of the reasons why there is no adequately defined concept of 'public authority' in the UK is precisely this focus on the functions performed by a public body as well as the proper rules of liability which should govern them.³⁴⁸

The particularities of non-contractual liability with respect to the Crown in its executive functions and the concurrent development towards a more concerted public law definition of 'the government' in the UK cover only a small part of the general concept of Crown liability for public authorities in torts. After all, the executive is just one of the three branches of the State, while the two others, the legislature and the

³⁴⁴ *X, supra* note 342, 363c *et seq.* In this context see also DUNCAN FAIRGRIEVE, *State Liability in Tort, A Comparative Law Study* (Oxford/New York, Oxford University Press, 2003), pp. 39 *et seq.* and CRAIG, *Administrative Law, supra* note 284, pp. 881 *et seq.*

³⁴⁵ The relationship between these two torts remains controversial. Thereby, the central issue is whether a breach of statutory duty constitutes a separate tort or rather a concretization of the concept of duty under the tort of negligence. The matter has been clarified to a certain extent in the House of Lord's judgment of *X, supra* note 342, 355f-358d. See also CRAIG, *Administrative Law, supra* note 284, pp. 888-889.

³⁴⁶ We will deal with these additional causes of action separately and in more detail at a later point in this chapter.

³⁴⁷ See for example J. BEATSON, "Public and Private in English Administrative Law" (1987) *LQR* 103, p. 34; H. WOOLF, "Public Law - Private Law: Why the divide?" (1986) *Public Law*, p. 220. Cf. CAROL HARLOW, "'Public' and 'Private' Law: Definition Without Distinction" (1980) *MLR* 43, pp. 241-265.

³⁴⁸ JOHN BELL and ANTHONY W. BRADLEY (eds.), *Governmental liability: A comparative study* (London, British Institute of International and Comparative Law, 1991), p. 17.

judiciary, have been deliberately factored out of this analysis so far. The reason for pursuing such a delimited approach towards the subject at the outset is that public liability for acts performed by the administrative branch in the UK as it had been established in the Crown Proceedings Act 1947 remains the exception rather than the rule. With respect to the two remaining branches of the State, we are faced with an even more constricted system of damages liability, namely a system composed of widespread vestiges of Crown immunity that cover the entire scope of the legislative as well as the judicial functions.³⁴⁹ Contrary to the rather complex framework we face with respect to vicarious liability of the Crown in its executive functions for torts committed by its servants or agents, Crown liability for wrongful legislative or judicial acts remains but an exceptional feature in the UK. To shed light on this lasting veil of immunity, we will take both, the legislative, but especially the judicial branch under close consideration.

b) Legislative and judicial wrongs

In practice there is already a reluctance to award compensation to an individual for harmful decisions taken by a public authority in the exercise of a statutory duty, insofar as it is acting *intra vires*, i.e. within the authority conferred upon it by Parliament. *A fortiori*, Acts of Parliament enacted by the sovereign power of Parliament can never give rise to liability.³⁵⁰ The same applies to acts of the judiciary, which, as mentioned before, enjoys immunity for all of its actions by virtue of section 2(5) Crown Proceedings Act.³⁵¹ Thus, in the UK the legislature and the judiciary enjoy, each on their own normative basis, absolute immunity from suit. In principle, English law does not have special rules of liability affecting particular public authorities. However, the different range of their duties and functions, which regulate the responsibilities of public authorities, will inevitably create differences in the scope

³⁴⁹ For the moment the influence of European Community law shall be left aside. A thorough analysis of this aspect will follow later in this chapter on pp. 114 *et seq.*

³⁵⁰ VAN GERVEN *et al.*, *Tort Law...*, *supra* note 340, p. 381; C. SMITS and A. VALLERY, "Le droit anglais" in G. Vandersanden and M. Dony (eds.), *La Responsabilité des États Membres En Cas De Violation Du Droit Communautaire* (Bruxelles, Bruylant, 1997), pp. 98-99.

³⁵¹ FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, p. 33.

of their liability. The defences that these powers create will mean that they are not liable for some activities, while their duties may create liability for certain acts, for which other public authorities would not be liable. Equally, the pattern of torts, under which they will be held responsible, differs according to the nature of their activities.³⁵²

Nevertheless, in the UK the fundamental maxim of '*ibi ius, ubi remedium*', ensuring the availability of a corresponding remedy for every right, constitutes a somewhat troublesome principle in relation to the judiciary's absolute immunity from suit. It provokes an open conflict between the two competing requirements of "the public interest in an independent judiciary free from the fear of vexatious personal actions, and the fundamental policy of common law, which seeks to provide an adequate remedy to a wrongfully injured member of the Community".³⁵³ While in most EU Member States a similar conflict of legal principles and values and the subsequent balancing exercise usually result in a compromise, in the UK a clear choice was made in favour of judicial independence. To put it bluntly, by preserving the shield of absolute immunity for judicial actions, the principle of judicial independence was given precedence over citizens' rights in the UK.³⁵⁴ In comparison to other countries the outcome in Britain was certainly radical. Consequently, it is natural to raise the question in this context whether a clear choice between the two conflicting legal principles really had to be made. As we will show in the course of the analysis of our three remaining archetypes, different approaches to resolve this conflict of values certainly point towards the fact that the principles of judicial accountability and judicial independence are not mutually exclusive.³⁵⁵ Furthermore, on this question the International Association of Judges confirmed already in 1984 that

³⁵² BELL and BRADLEY (eds.), *supra* note 348, p. 34. The functions referred to in this context are, for example, the police, prison authorities, armed forces *et al.*

³⁵³ Wood J. of New South Wales in *Moll v Butler* [1985] 4 NSWLR 231, 239.

³⁵⁴ See Burrough J. in *Richardson v. Mellish* [1824] 130 E.R. 294, 303 in ABIMBOLA A. OLOWOFOYEKU, *Suing Judges: A Study of Judicial Immunity* (Oxford, Clarendon Press, 1993), p. 3.

³⁵⁵ See similar discussions for the remaining three examples of Austria (in chapter IV, pp. 169 *et seq*), France (in chapter V, pp. 232 *et seq*) and Belgium (in chapter VI, pp. 309 *et seq*).

[i]ndependence does not [...] mean absence of responsibility for his own actions. The concept which regards the judge as unrestrained by law (*legibus solutus*) would end, sooner or later, in protecting, not so much his necessary freedom, as the arbitrariness of his decisions.³⁵⁶

i) Crown liability for legislative breaches under domestic law

In the joined cases *Brasserie du Pêcheur* and *Factortame*,³⁵⁷ an alleged non-liability of the State for acts or omissions of the legislature was raised by the British authorities in order to deny, on an abstract level, the existence of State liability in the given circumstances.³⁵⁸ The overriding concept of parliamentary sovereignty provided the normative basis for this decision. The fundamental maxim of parliamentary sovereignty stipulates absolute sovereignty of Parliament as the supreme law-making body in the UK. Albert Dicey explained the concept in his book *Introduction to the Study of the Law of the Constitution* as, “the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”³⁵⁹

Sovereign legislation owes its validity to no superior authority. The courts accept it in its own right.³⁶⁰ Under the traditional rules, in case of conflict any previous Act can always be expressly or impliedly repealed by a later Act. However, the full nature of legislative supremacy is reflected in the relation between the legislative authorities and the judicial branch in the UK, i.e. between the organ which creates and the organ which applies Acts of Parliament. Parliamentary sovereignty not only means that courts are bound to apply Acts of Parliament, but that at the same

³⁵⁶ United Nations Social Defence Research Institute & International Association of Judges, *The Role of Judges in Contemporary Society* (Rome, Palombi, 1984).

³⁵⁷ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 1 *et seq.*

³⁵⁸ See Opinion Advocate General Tesauro in *Ibid.*, p. 5.

³⁵⁹ In this context Stevens even speaks of the Diceyan concept of supremacy of parliament; see ROBERT STEVENS, *The English Judges: Their Role in the Changing Constitution* 2nd ed. (Oxford, Hart Publishing, 2005), p. 89.

³⁶⁰ See WADE and FORSYTH, *Administrative law*, *supra* note 280, p. 26 as well as CAPPELLETTI, *The Judicial Process...*, *supra* note 49, pp. 198 *et seq.*

time they also have no power to question or challenge their validity. According to Lord Morris,

[i]t is the function of the courts to administer the laws which Parliament has enacted. In the process of Parliament there will be much consideration whether a Bill should or should not in one form or another become an enactment. When an enactment is passed there is finality unless and until it is amended or repealed by Parliament. In the courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the Statute Book at all.³⁶¹

As a consequence, in the UK there is no judicial review of primary legislation passed by the Parliament. Courts are bound to apply the law and may not review a legislative act or question its validity as futile as the law may be. At the most, courts are granted a certain leeway of interpretation of a legislative act. Therefore, under domestic law, courts simply cannot uphold an individual's claim for damages based on a legislative act without at the same time violating the principle of parliamentary sovereignty. It follows that Parliament can make or unmake any law it wishes and no person or body can set aside or override such legislation.³⁶² As a corollary, Parliament enjoys absolute immunity with respect to damages claims by individuals.³⁶³

ii) Crown liability for judicial breaches under domestic law

A preliminary point to be clarified at the outset of this analysis concerns the peculiar status of the judiciary in the United Kingdom. In the United Kingdom constitution, the judiciary as a body is not simply perceived as an additional branch of the State. Interestingly, as we will see later on, this view on the position of the

³⁶¹ Lord Morris in *Pickin v. British Railways Board* [1974] A.C. 765, 789a-b.

³⁶² The perspective presented here is a purely domestic one and factors out the position of Community law or the European Convention on Human Rights in this context. Parliamentary sovereignty certainly underwent a certain degree of erosion through both, Community law and the ECHR, but we will discuss this issue separately.

³⁶³ See VAN GERVEN *et al.*, *Tort Law...*, *supra* note 340, p. 391; CAPPELLETTI, *The Judicial Process...*, *supra* note 49, p. 165.

judiciary within the State apparatus is precisely opposite from what the CJEU has voiced in the *Köbler* ruling.³⁶⁴ In the UK judges are first and foremost regarded as members of the independent judiciary. The view that the judge might be an ordinary servant of the Crown and, by extension that vicarious liability applies, has been rejected under UK law.³⁶⁵ Still, officers of courts of justice³⁶⁶ can be regarded as Crown servants in a number of ways. They hold positions granted by the Crown, swear oaths to uphold the law and are “persons by whom the functions of government of a state are carried out”.³⁶⁷ Seen from this angle, one could argue that the judiciary is undeniably part of the State apparatus.³⁶⁸ However, in light of their functions, judges should always be free to rule without influence and pressure from the legislative or the executive power.³⁶⁹ Moreover, in order to protect their independence, judicial officers have been excluded from the regular mechanisms of accountability. However, practice has shown that even judges are not free from errors.

Both the UK and Ireland have adopted an exceptionally lenient approach towards the judiciary in this respect. Instead of holding judges or the judiciary accountable for their faults, the judicial branch has been shrouded in an almost impenetrable cloak of protection. This principle is known as absolute judicial immunity. In the UK, Ireland and in all the other Member States pertaining to group I of our classificatory scheme, the concept of State liability for judicial breaches

³⁶⁴ HELEN SCOTT, "State Liability under *Francovich* for Decisions of National Courts" (2004) *L.Q.R.* 120 (Jul), p. 406.

³⁶⁵ See W. HOLDSWORTH, "The Constitutional Position of the Judges" (1932) *LQR* 48, p. 27; see also Lord Hailsham (dissenting) in *Ramesh Lawrence Maharaj Appellant v. Attorney-General of Trinidad and Tobago (no. 2) Respondent* [1979] AC 385, PC, 409.

³⁶⁶ The expression ‘officers (of courts) of justice’ comprises all the officials pertaining to the judicial branch, which act either judicially or ministerially. We will use this term in the remainder of this chapter in order to refer to all judicial officers in the UK. As in CLERK, *Torts*, *supra* note 172, p. 1475.

³⁶⁷ WADE and FORSYTH, *Administrative law*, *supra* note 280, p. 818; In this context see also the judgment by the Privy Council in *Ranaweera v. Ramachandran* [1970] AC 962, PC.

³⁶⁸ See HOLDSWORTH, "Constitutional Position...", *supra* note 365, p. 28.

³⁶⁹ The British system is not one of separation of powers, but one of balance of powers. Parliamentary sovereignty, the wide jurisdiction of the Lord Chancellor, together with the appointment of judges by a politician and the dual role of the Law Lords have made it difficult to establish an institutional concept of judicial independence, based on a notion of separate branches of government, in the UK. Nevertheless, English judges adhere to the concept of judicial independence. For details on this question see, *inter alia*, STEVENS, *The English Judges*, *supra* note 359, p. 97 and OLOWOFOYEKU, *Suing Judges*, *supra* note 354, pp. 178 *et seq.*

therefore reaches its utmost limits of constraint.³⁷⁰ Immunities postulate that judges have to be shielded from liability for harm suffered by an individual by virtue of them having acted as judges, no matter if they were malicious or careless in their actions.³⁷¹ Accordingly, officers of courts of justice not only enjoy the privilege³⁷² of special immunity from actions in tort, but also of personal immunity of civil and/or criminal liability for acts done or words spoken in the exercise of their duties. In the United Kingdom all these elements fall under the joint umbrella of absolute judicial immunity as proclaimed in s. 2(5) of the Crown Proceedings Act 1947.

According to this doctrine, such wide-ranging protection is justified by the need to ensure that judicial organs act in the interests of justice, without fear of possible liability for what they do. The objective is to strengthen their independence, so that judicial decisions may not be warped by fear of personal or collective liability. Already at this point we can observe that the UK, as our prototype representing the countries included in group I, applies a wide interpretation of the general principle of judicial independence. In fact, Rogers goes as far as to classify judicial independence as a right of the public rather than a privilege of the judges themselves. He claims that it is simply not in the public interest to inquire whether judicial “acts [...] are malicious or not.”³⁷³ Frequently, the adherence to the denial of damages as a remedy for judicial breaches has also been justified by referring to alternative forms of redress. The argument put forward is that there are other remedies to compensate for judicial misconduct, but that those remedies do not lie in an action for damages and are frequently not to be obtained in court.³⁷⁴ However, it remains doubtful to what extent those ‘alternative’ remedies are effective as a means of redressing judicial wrongs.

³⁷⁰ WADE and FORSYTH, *Administrative law*, *supra* note 280, pp. 771-774.

³⁷¹ In this manner also ABIMBOLA A. OLOWOFOYEKU, "Accountability versus Independence: The Impact of Judicial Immunity" in G. Canivet *et al.* (eds.), *Independence, Accountability, and the Judiciary* (London, British Institute for International and Comparative Law, 2006), p. 2.

³⁷² Cf. Rogers, who strongly opposes labelling the immunity of judges in the UK as a “privilege.” ROGERS, *Tort*, *supra* note 284, p. 1033.

³⁷³ *Ibid*, p. 1033.

³⁷⁴ OLOWOFOYEKU, *Suing Judges*, *supra* note 354, p. 143. In this context the author suggests the following available remedies: appellate review, dismissal of the errant judicial officer, or criminal proceedings against the judge.

The principle of judicial immunity covers the personal liability of the judge for judicial misconduct and the State's vicarious liability for that misconduct. We will predominantly focus on the latter form of liability. As for personal liability of judicial officers, it is perhaps worthy of mention that the two decisive judicial rulings in that respect were the cases of *Sirros v. Moore*³⁷⁵ in 1975 and *Re McC (A Minor)*³⁷⁶ in 1985. While the precise ambit of personal liability of officers of justice still has not been conclusively regulated, it is undisputed that no judge, whether of a superior or an inferior court, is liable if acting within his/her jurisdiction, even if this is done maliciously.³⁷⁷ Moreover, judges of the High Court are immune from liability for any act of a judicial character, even in case of an *ultra vires* act, provided that the judge pursued it in the honest belief to be within his/her jurisdiction.³⁷⁸ Liability will only arise if in bad faith judges do what they know they have no power to do, such as knowingly acting outside one's jurisdiction.³⁷⁹ This latter principle applies to any judicial officer, including justices of the peace.³⁸⁰

In addition to the judges' far-reaching personal immunity from suit, the State *alias* the Crown also cannot be held liable for erroneous acts committed by its judicial officers in the course of their duties. While waiving the Crown's immunity from tortious liability in the Crown Proceedings Act 1947, the UK Parliament nevertheless fully preserved the Crown's immunity in specific cases, including damages liability for harm caused by its judicial officers. In fact, Section 2(5) of the CPA 1947

³⁷⁵ *Sirros v. Moore and Others* [1975] QB 118-150. See also CLERK, *Torts*, *supra* note 172, pp. 1476 *et seq.*

³⁷⁶ *Re McC (A Minor)* [1985] AC 528-559.

³⁷⁷ See *Sirros*, *supra* note 375, 132-133 and *Re McC*, *supra* note 376, 540-541. For a detailed account of the personal liability regime of officers of justice see CLERK, *Torts*, *supra* note 172, pp. 1475 *et seq.*; WADE and FORSYTH, *Administrative law*, *supra* note 280, pp. 771-774. For a general overview on the personal liability of judges in the UK see also CRAIG, *Administrative Law*, *supra* note 284, p. 921.

³⁷⁸ *Sirros*, *supra* note 375, 134-135; *Re McC*, *supra* note 376, 550. See also ROGERS, *Tort*, *supra* note 284, pp. 1033 *et seq.*

³⁷⁹ *Sirros*, *supra* note 375, 149; *Re McC*, *supra* note 376, 540g-h: If a judge (but not a magistrate) takes a decision in good faith, which is beyond his/her powers, he/she will not be liable to the person affected.

³⁸⁰ As in 'Justices of the Peace Act 1997' (c. 25), which is replacing the 'Justices' Protection Act 1848' and re-enacting provisions introduced by the 'Courts and Legal Services Act 1990'. A full-text version of the Justices of the Peace Act 1997 is available at www.opsi.gov.uk/acts/acts1997/ukpga_19970025_en_1.

postulates that “[n]o proceedings shall lie against the Crown [...] in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibility of a judicial nature vested in him.” The precise definition of what is to be understood by “responsibilities of a judicial nature” in s. 2(5) CPA 1947 has been clarified in the substantial amount of case-law on the matter.³⁸¹ Accordingly, any action against the Crown based on the acts of judicial officers will have no chance of success in the UK, no matter if the judicial officer concerned presides over a superior court or an inferior court.

Due to the strong historical ties between the two Member States, the situation under Irish law is rather similar to the one we encounter in the UK.³⁸² Until the creation of the Irish Free State in 1922, the country had been an integral part of the British legal system, of which the principle of absolute Crown immunity was unquestionably an important part. Nevertheless, even after gaining independence from the UK in 1922, it took the country another fifty years to fully abandon the doctrine of sovereign immunity. It was only in 1972 in the famous case of *Byrne v. Ireland*³⁸³ that the Supreme Court explicitly declared that the principle of sovereign immunity was incompatible with the Irish Constitution and that the State was in fact vicariously liable for the torts committed by public authorities in the course of their actions.³⁸⁴

While Irish judges had enjoyed full immunity from suit for judicial acts under common law,³⁸⁵ it was not immediately clear whether the verdict in *Byrne v. Ireland* had also abrogated the principle of judicial immunity. In a follow-up decision in 1974,

³⁸¹ As to what classifies as “responsibilities of a judicial nature” see the following cases: *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* [1892] 1 Q.B. 431; *Addis v. Crocker* [1960] 2 All E.R. 629; *Jones v. Department of Employment* [1988] 1 All E.R. 725 Cases cited in DAVIES (ed.), *Halsbury’s Statutes* (2000), *supra* note 289, Commentary on s. 2(5) CPA 1947, p. 13. On public liability with respect to ministerial acts performed by magistrates see, *inter alia*, *Linford v. Fitzroy* [1849] 13 QB 240.

³⁸² After all, prior to 1922 Ireland had still been part of the United Kingdom, was ruled by the Crown and also fully adhered to the Crown’s legal system.

³⁸³ *Byrne v. Ireland* [1972] I.R. 241.

³⁸⁴ *Ibid*, pp. 241 *et seq.* In this context see also GERARD HOGAN and TONY KERR, “The Law of Ireland” in J. Bell and A. W. Bradley (eds.), *Governmental Liability: A Comparative Study* (London, United Kingdom National Committee of Comparative Law, 1991), pp. 148 *et seq.*

³⁸⁵ See for example *Tughan v. Craig* [1918] 1 I.R. 245.

Lord Salmon appeared to confirm the continuation of the doctrine of judicial immunity when he stated that “[i]t is well settled that judges, barristers, solicitors, jurors and witnesses enjoy an absolute immunity in respect of any civil action being brought against them in respect of anything they say or do in court during the course of the trial.”³⁸⁶ Subsequent jurisprudence further supported this idea that under Irish law persons discharging judicial functions still enjoy complete immunity from suit in the exercise of their judicial duties.³⁸⁷ Like the UK, the Republic of Ireland is therefore undeniably part of group I of our classification scheme, which is marked by a total exclusion of State liability for judicial breaches under domestic law.³⁸⁸

In spite of the fact that British law generally adheres to the principle of granting redress for all wrongs as exemplified by the maxim of *ubi jus ibi remedium*,³⁸⁹ the doctrine of judicial immunity represents an insurmountable impediment to those seeking redress for any damage caused by the judiciary. Even more so, judicial immunity is a principle that on the basis of its indiscriminate operation even obstructs those individuals from seeking redress, who have been victims of severe judicial misconduct or who have suffered serious loss as a result of a judicial error. As mentioned above, the same situation arises under Irish law where in a similar manner the principle of absolute judicial immunity stands in stark opposition to Article 40.3 of the Irish Constitution.³⁹⁰ This constitutional provision broadly stipulates that the State is required to defend and vindicate the personal rights of its citizens. However, the tension between those two legal principles is somehow alleviated by Articles 34 and 35(2) of the Irish Constitution, which uphold the fundamental principle of judicial

³⁸⁶ *Sutcliffe v. Thackrah* [1974] A.C. 727

³⁸⁷ This has been confirmed in judgments such as *Sutcliffe v. Thackrah* [1974] A.C. 727 and *Pine Valley Developments Ltd v. Minister for the Environment* [1987] I.R. 23.

³⁸⁸ For all other members of group I see overview on p. 168.

³⁸⁹ Accordingly, Holt CJ stated in *Ashby v. White* [1703] 92 E.R. 126, 136 that “[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.”

³⁹⁰ Which states: “(1) The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. (2) The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

independence.³⁹¹ Similar to the wide interpretation of judicial independence under British law, in Ireland the protection of the independence of the judiciary also serves as one of the core justifications for the concept of absolute judicial immunity from suit.³⁹² In sum, apart from very few exceptions,³⁹³ under British and Irish law we are faced with a complete absence of domestic legal remedies for damage caused to individuals on the basis of a judicial act. Accordingly, Crown or State responsibility for harm caused by the national judiciary is a concept foreign to the national legal orders of these EU Member States.

4. Did the *Francovich* case-law prior to *Köbler* have a spill-over effect on the concept and/or the limits of Crown liability in England?

The UK's membership in the European Communities in 1973 resulted in a revolutionary modification of its legal system. In line with the general influence exerted by EC law on the legal framework of each Member State, the European Communities Act 1972³⁹⁴ provided for the incorporation of the Community *acquis* into the domestic legal order and consequently also introduced such fundamental principles as the primacy of EC law in the UK. While “any enactment passed or to be passed”³⁹⁵ was from then on to be interpreted in conformity with Community law, EC law also simply trumped inconsistent national rules.³⁹⁶ The ECA 1972 thereby clarified once and for all that in the event of a clash, Community law would take precedence over national law, including all future legislation. Or, in the words of Lord Denning, that if “it should appear that our legislation is deficient or inconsistent with Community law by some oversight of our draftsmen then it is our bounden duty to

³⁹¹ A full-text version of the Irish Constitution is available under: www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20Ireland.pdf.

³⁹² See, *inter alia*, HOGAN and KERR, “Ireland...,” *supra* note 384, pp. 151-153.

³⁹³ Such exceptions are provided by the Human Rights Act 2000 and by EU law. We will deal with both cases in detail in a separate part of this chapter.

³⁹⁴ European Communities Act of 17 October 1972 (c. 68), available under: www.opsi.gov.uk/acts/acts1972/pdf/ukpga_19720068_en.pdf. Henceforth also referred to as “ECA 1972”.

³⁹⁵ As in s. 2(4) European Communities Act 1972.

³⁹⁶ CRAIG, “The European Community, the Crown...,” *supra* note 262, p. 329; see also Case 6/64, *Flaminio Costa v. E.N.E.L.* [1964] ECR 585, 593 and Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

give priority to Community law.”³⁹⁷ In practice, a landmark case regarding the application of the principle of primacy of EC law in the UK was the famous *Factortame* litigation, which led to a number of decisions both in the national courts in the UK and the Court of Justice of the EU.³⁹⁸ Furthermore, a significant new head of governmental liability was introduced when the UK joined in 1973. According to Community law and the CJEU’s famous *Francovich*-line, a breach of Community obligations could render the British government liable to pay compensation under rules, which still constitute a moving target under EC law in that they are subject to continuous development in the case-law of the CJEU in Luxembourg.³⁹⁹

What impact did the UK’s membership in the EC have on the concept of the Crown in general and the non-contractual liability regime of the State in particular? Was the *Francovich* case-line of the CJEU well received by the courts in England and Wales? And did the Community legal structure have a lasting impact on the UK’s unique system of torts? As these questions involve a large number of different aspects, it is not possible to provide an exhaustive analysis of all the issues involved within the confines of this chapter. However, our aim is the more modest one of devoting special attention to the general impact EC law might have had so far on the liability regime of the Crown for damage caused by public organs in the exercise of their official duties. This way, we may also be able to make tentative predictions and draw preliminary conclusions on the future implementation of the newly-established *Köbler* doctrine under the existing legal framework of public liability in England and Wales.

The development and the introduction of a remedy in damages for breach of Community law in the UK has been shaped in particular by two important judicial rulings, which lie almost thirty years apart. Already in a 1974 case the question arose

³⁹⁷ *Macarthy Ltd. v. Smith* [1979] 3 All ER 325, 329.

³⁹⁸ We will take a close look at the *Factortame* litigation in section 4(a) of this chapter. On the general implications of *Factortame* on the issue of sovereignty in the UK see PAUL P. CRAIG, "Sovereignty of the United Kingdom Parliament after *Factortame*" (1991) *Yearbook of European Law* 11, pp. 221-255.

³⁹⁹ For the *Francovich*-related case-law of the CJEU see, *inter alia*, C-46 & 48/93, *Brasserie*, *supra* note 4, C-91/92, *Paola Faccini Dori*, *supra* note 84, C-6 & 9/90, *Francovich*, *supra* note 2, *et al.*

whether, parallel to the prevailing claims under national law, there were any additional defences available under the EC Treaty.⁴⁰⁰ At that point Lord Denning underlined once more that Community law was an integral part of the British legal order and that it also created “new torts or wrongs”,⁴⁰¹ which were to be applied by the courts in the UK. However, from this declaration in 1974 it took another 20 years until Lord Denning’s dictum finally took full effect in 1996 in the joined cases of *Brasserie du Pêcheur and Factortame*.⁴⁰² In fact, a number of obstacles had to be overcome following the introduction of the new ‘Community tort’ in the UK.⁴⁰³ It took several years before the national courts fully accepted that it was possible for a litigant to be awarded damages for a breach of Community law under conditions which were less restrictive than those countenanced by existing private law remedies in England and Wales.⁴⁰⁴ Difficulties arose in this context in particular in the UK as – contrary to many other European legal systems – English law does not accept a general right to damages for maladministration. Or, in the words of Lord Browne-Wilkinson, such action “by itself, gives rise to no claim for damages”.⁴⁰⁵ In fact, in the UK any compensation sought “must be based on a private law cause of action”, such as negligence, breach of statutory duty, or misfeasance in public office.⁴⁰⁶

A vivid proof for the initial scepticism on the part of the judges towards the new ‘Community tort’ was the dictum of Lord Justice Nourse in the ruling of the Court of Appeal in *Bourgoin SA and Others v Ministry of Agriculture Fisheries and Food*⁴⁰⁷ in 1986, in which he underlined that

⁴⁰⁰ *Application des Gaz SA v. Falks Veritas Ltd* [1974] 3 All ER 51-62.

⁴⁰¹ *Ibid*, 58.

⁴⁰² C-46 & 48/93, *Brasserie*, *supra* note 4, para. 67.

⁴⁰³ See CRAIG, “Sovereignty...”, *supra* note 398, p. 241-242.

⁴⁰⁴ See, for example, *Duke v. GEC Reliance Ltd* [1988] AC 618; CRAIG, “Sovereignty...”, *supra* note 398, pp. 242 *et seq.*

⁴⁰⁵ Lord Browne-Wilkinson in *X*, *supra* note 342, 2 A.C. 633, 749. See also *Hoffmann-La Roche v. Secretary of State for Trade and Industry* [1975] AC 295, 359.

⁴⁰⁶ *R v. Metropolitan Borough of Knowsley, ex p Maguire* (1992) Times, 26 June, DC per Schiemann J. On the general implications of the *Francovich*-line for English law, see, *inter alia*, T.A. DOWNES, “Trawling for a remedy: state liability under Community law” (1997) *Legal Studies* 17, pp. 286 *et seq.*

⁴⁰⁷ *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food* [1986] 1 QB 716, 789-790.

[i]n this country the law has never allowed that a private individual should recover damages against the Crown for an injury caused to him by an *ultra vires* order made in good faith. Nowadays this rule is grounded not in procedural theory but on the sound acknowledgement that a minister of the Crown should be able to discharge the duties of his office expeditiously and fearlessly, a state of affairs which could hardly be achieved if acts done in good faith, but beyond his powers, were to be actionable in damages.⁴⁰⁸

In theory, this judgment severely restricted the ability of an individual to obtain redress under British law on the basis of a claim for breach of Community law. Even though it was possible for an individual to bring a claim for damages if he or she could show that the breach of EC law amounted to a breach of statutory duty⁴⁰⁹ or misfeasance in public office,⁴¹⁰ the elements required for both these torts were generally rather difficult to prove.⁴¹¹ However, over time the courts accepted the fact that Community law had expanded the list of torts applicable in the UK. Among the breaches of Community law committed by administrative and legislative authorities in the UK, it will be especially interesting for the purposes of our study to analyse the method which was used in the UK to internalize liability claims for legislative breaches of EC law. After all, the latter is a cause of action which is entirely unknown under domestic law in the UK. As we encounter a similar situation with respect to the judicial branch, this example provides us with a valuable precedent, which might allow us to draw analogies to a future reception of liability claims for judicial breaches of Community law under the legal system of England and Wales.

⁴⁰⁸ Ibid, 790b-c.

⁴⁰⁹ *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130.

⁴¹⁰ *Bourgoin*, *supra* note 407, 789-790.

⁴¹¹ See also JANE CONVERY, "State Liability in the United Kingdom After *Brasserie du Pêcheur*" (1997) 34 *CMLR* 3, p. 603.

a) Brasserie du Pêcheur/Factortame

With the CJEU's ruling in *Francovich and Bonifaci v. Italy*⁴¹² in November 1991 the deadlock under English law seemed to have been broken. In this judgment, the CJEU declared that the full effectiveness of Community rules would be impaired if individuals were unable to obtain compensation whenever their rights had been infringed by a breach of EC law, for which a Member State could be held responsible.⁴¹³ Accordingly, the CJEU established that in such a case the respective Member State would be liable for "loss and damage caused to individuals as a result of a breach of Community law".⁴¹⁴ In light of this decision, the House of Lords openly called into question whether the *Bourgoin* case had been decided correctly at the time.⁴¹⁵ Nevertheless, until 1996 several judgments in the UK still cast doubts on the existence of a right to recover loss suffered through the enforcement of a domestic law, which was found to be incompatible with Community law. Furthermore, these cases also suggested that there was no procedure under domestic law whereby an individual could claim damages from the State for failure to legislate in accordance with Community law.⁴¹⁶

In 1996 the CJEU's groundbreaking joint ruling in *Brasserie du Pêcheur* and *Factortame*⁴¹⁷ significantly changed British law. The *Factortame* case first came to prominence when the Spanish fishing company Factortame appealed to the UK courts against restrictions imposed upon it by the UK government under the Merchant Shipping Act 1988.⁴¹⁸ In brief, the enactment of this statute, which was allegedly

⁴¹² C-6 & 9/90, *Francovich*, *supra* note 2, hereinafter also referred to as "the *Francovich* ruling".

⁴¹³ *Ibid*, para. 33.

⁴¹⁴ *Ibid*, para. 35.

⁴¹⁵ See *Kirklees Metropolitan Borough Council v. Wickes Building Supplies Ltd* [1992] 3 WLR 170. On this question, see also DOWNES, "Trawling for...", *supra* note 406, pp. 293 *et seq.* and BARAV, "State Liability...", *supra* note 99, pp. 105 *et seq.*

⁴¹⁶ *Chisholm v. Kirklees Metropolitan Borough Council* [1993] ICR 826; *R. v. Secretary of State for Employment ex parte Seymour-Smith* [1994] IRLR 448.

⁴¹⁷ C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 1 *et seq.* See also CRAIG, "Sovereignty..."., *supra* note 398, pp. 243 *et seq.*

⁴¹⁸ The factual background of the case can be found under C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 60 *et seq.*

inconsistent with Community law, had caused the damage suffered by the applicants in the case. Therefore, the claimants sought compensation from the State for the loss they had sustained as a result of the harmful legislative act.⁴¹⁹ In light of the contradictions that prevailed under British law between the dicta in the judgments in *Bourgoin*⁴²⁰ and *Francovich*⁴²¹ at the time, the Divisional Court made a request for a preliminary ruling to the CJEU in order to clarify the conditions under which a Member State could incur liability for damage caused to individuals by a breach of Community law.

The preliminary reference in the case raised the problem that courts in the UK were prevented by domestic law from awarding damages in instances like the *Factortame* case, which sought redress for breaches of law attributable to the national legislature. Notwithstanding the position under domestic law, the CJEU proclaimed that the State could be held liable in damages “regardless of the organ of the state whose act or omission was responsible for the breach”.⁴²² In fact, in his Opinion⁴²³ in the case Advocate General Tesaro raised the specific issue of violations of Community law committed by the national legislature. The reasons for his full support for an alleged liability of the State for acts or omissions of the legislature were threefold. First, as mentioned before, the Advocate General explicitly referred to the unitary concept of the State under international law. The same principle, he claimed, was applicable under Community law, so that there was no need to differentiate between cases where the infringement originated in a legislative as opposed to an administrative act.⁴²⁴

⁴¹⁹ Ibid, para. 68.

⁴²⁰ *Bourgoin*, *supra* note 407, see also GEIGER, *Der gemeinschaftsrechtliche Grundsatz...*, *supra* note 82, pp. 35 *et seq.*

⁴²¹ C-6 & 9/90, *Francovich*, *supra* note 2, paras. 1 *et seq.*

⁴²² *R. v. Secretary of State for Transport, ex parte Factortame (no. 7)* [2001] 1 WLR 942, 966, para. 32. See also CRAIG, “Once More Unto the Breach...”, *supra* note 107, pp. 67 *et seq.*

⁴²³ Opinion Advocate General Tesaro in C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 1 *et seq.*

⁴²⁴ Ibid, para. 35. See also CRAIG, “Sovereignty...”, *supra* note 398, pp. 245-246 and SCOTT, “State Liability...”, *supra* note 364, p. 406.

Secondly, the Advocate General advanced the rationale that even the legislature had to comply with certain limits imposed by superior rules. As a corollary, the State was also bound to compensate individuals for the loss they had suffered by adhering to domestic laws, which in reality exceeded those limits.⁴²⁵ Finally, Tesauro underlined the fact that the UK had joined the EC on the basis of a contractual agreement. Particular features underlying the Treaty obligations included the supremacy of Community law and the doctrine of direct effect. Hence, liability for legislative acts that were in breach of such obligations to which Britain had contractually agreed was perfectly consistent with the Community legal order.⁴²⁶ In light of all those aspects, Tesauro concluded that for individual rights established under Community law the review of adequacy of protection afforded by each national legal system had to extend so far as to require Member States to develop new remedies. This was also the solution to be applied in the United Kingdom in this specific case.⁴²⁷

In the *Factortame* ruling the CJEU explicitly confirmed that a public body could be held liable in damages if it had committed a sufficiently serious breach of a provision of European Community law, which was intended to confer rights on individuals, and if that individual suffered loss as a result. This was true irrespective of which organ of the State was responsible for the breach, i.e. the legislature, the executive or the judiciary.⁴²⁸ Moreover, the Court also announced that

[i]n that regard, restrictions that exist in domestic legal systems as to the non-contractual liability of the State in the exercise of its legislative function may be such as to make it impossible in practice or excessively difficult for individuals to exercise their right to reparation, as guaranteed by

⁴²⁵ Opinion Advocate General Tesauro in C-46 & 48/93, *Brasserie*, *supra* note 4, para. 37.

⁴²⁶ *Ibid*, para. 39.

⁴²⁷ *Ibid*, para. 14.

⁴²⁸ *Ibid*, para. 34.

Community law, of loss or damage resulting from the breach of Community law.⁴²⁹

Along the same lines, the CJEU followed up by proclaiming

that [...] it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused; further, the conditions [...] for reparation of loss or damage laid down by national law must not be less favourable than those relating to similar domestic claims (principle of equivalence) and must not be framed as to make it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness).⁴³⁰

b) Birth of the 'Euro-tort'

With reference to the principle of national procedural autonomy, the core question for every Member State in this specific context is whether a breach of European Community law is actionable in the same way as a corresponding claim based on a violation of domestic law. If so, which remedy could possibly serve as the equivalent domestic law remedy to the underlying Community right which was infringed? Unlike French or Belgian law, English tort law does not recognise a general right to damages for unlawful administrative acts.⁴³¹ Consequently, it is impossible to equate the Community-based right to damages for breaches of EC law with one single cause of action under English tort law. Moreover, as mentioned before, problems of a different nature arise in the UK with respect to violations committed by the legislature and the judiciary concerning the extent to which the domestic legal order is able to accommodate such 'species' of liability.⁴³² In fact, the

⁴²⁹ Ibid, para. 68.

⁴³⁰ Case C-261/95, *Rosalba Palmisani v. Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-04025, para. 27.

⁴³¹ With respect to this question under French law see chapter V, pp. 275 *et seq*; for Belgium see chapter VI, pp. 376 *et seq*.

⁴³² CRAIG, "The European Community, the Crown...", *supra* note 262, p. 327.

Factortame litigation highlighted the lack of a suitable cause of action under domestic law in the UK on the basis of which a claim could have been brought for harm incurred by the enactment of a law or for damage caused by an act of the executive branch unless, perhaps, misfeasance could be established.⁴³³

In many countries the rights created under Community law cannot be easily accommodated within the remedial structure of the different national legal orders.⁴³⁴ This was also the case in the UK where there is a complete absence of an equivalent domestic cause of action for breaches of law committed by the national legislature or the judiciary. However, by virtue of the UK's membership in the EU and the corresponding provisions of the European Communities Act 1972, appropriate remedies had to be available under national law in order to ensure the strict enforcement and the full effectiveness of the rights which individuals had acquired under Community law. Lacking such a suitable domestic cause of action, which solution was applied in the UK in the *Factortame* case? And could this method serve as a precedent and model for the difficult task of 'transplanting' individual rights established in the *Köbler* case into the domestic remedial framework in the UK? Finally, what are the precise standards required by the principle of national procedural autonomy in this context?

With reference to the questions raised above, an interesting interpretation was provided by Mr Justice Toulmin in the *Factortame* ruling of 2001.⁴³⁵ In this case he defined tort as "a breach of non-contractual duty which gives a private law right to the party injured to recover compensatory damages at common law from the party causing the injury." Mr Justice Toulmin finally concluded that a claim brought by an individual against the State for a breach of EC law constituted an action on tort within the meaning of the Limitation Act 1980. Accordingly, he suggested that 'Euro-tort'⁴³⁶

⁴³³ Divisional Court, *R v. Secretary of State for Transport, ex p. Factortame* [1998] 1 C.M.L.R. 1353, para. 89.

⁴³⁴ See *Matra Communications S.A.S. v. Home Office* [1999] 3 All ER 562, 573a-b.

⁴³⁵ *Factortame* (7), 65.

⁴³⁶ Expression used, *inter alia*, by Mr Justice Toulmin in *Ibid*, 966. See also LUNNEY and OLIPHANT, *Tort, supra note 339*, p. 627 and MERRIS AMOS, "Eurotorts and Unicorns: Damages for Breach of Community Law in the United Kingdom" in D. Fairgrieve *et al.* (eds.), *Tort Liability of Public*

would be the suitable expression to be used in this context.⁴³⁷ By this point, in theory the existence of a domestic remedy for breach of EC law was generally accepted in the UK. However the interpretation and application of the so-called Euro-tort in practice still left a number of questions unanswered. In light of the fact that so far every major leap forward in the development of the Euro-tort in the United Kingdom has been triggered by a judgment of the Court of Justice of the EU, the continuing advancement of the *Francovich* doctrine by the CJEU, such as recently in the case *Traghetti del Mediterraneo SpA v. Italy*⁴³⁸ or the *Köbler* case, still poses new challenges for judges in the UK.

After the general recognition of an individual right to a remedy following a violation of Community law by a public authority, the discussion in the UK moved on to the problem of characterizing the separate cause of action for this kind of breach under domestic law.⁴³⁹ Controversy persisted as to the precise nature of the domestic claim, which was applicable in cases with a Community law component. Generally speaking, in order to ensure the full effectiveness of rights guaranteed under Community law, national courts had to search not only for a domestic action that was closely related to the claim asserting Community rights, but also for one which in its overall structure and application resembled the claim under EC law. The domestic courts were therefore advised to consider “the purpose and the essential characteristics of allegedly similar domestic actions”.⁴⁴⁰

In theory, the classification of liability claims in damages resulting from a breach of EC law could have been handled in various manners in the United Kingdom. A first option, which originally advanced in academic writings but which eventually also prevailed in the jurisprudence, was to classify such cases as giving rise

Authorities in Comparative Perspective (London, British Institute of International and Comparative Law, 2002), pp. 109 *et seq.*

⁴³⁷ *Factortame* (7), 966.

⁴³⁸ C-173/03, *Traghetti*, *supra* note 134, paras. 1 *et seq.*

⁴³⁹ AMOS, “Eurotorts and Unicorns,” *supra* note 436, p. 114.

⁴⁴⁰ Case C-326/96, *B.S. Levez v. T.H. Jennings (Harlow Pools) Ltd.* [1998] ECR I-07835, para. 43. See also C-261/95, *Palmisani*, *supra* note 430, paras. 34-39.

to an autonomous cause of action under the legal system of England and Wales, without the necessity of fitting them into pre-existing domestic heads of liability. In this way, the 'Euro-tort' was a new cause of action and liability in damages simply took effect whenever the three conditions set out by the CJEU were met. In hindsight, this not only seemed to be the most straightforward way of proceeding, but also appeared to be the method which most closely resembled the British exceptionalist attitude with respect to the position of Community law within the domestic legal order.⁴⁴¹

By way of a contrast, a second option could have been to fit the claim under a domestic head of liability for breach of statutory duty. This possibility had actually been considered in *Garden Cottage Foods Ltd. v. Milk Marketing Board*,⁴⁴² in which, after declaring a breach of Community law as actionable in damages, the House of Lords classified the claim as one for breach of statutory duty. In a similar vein, Lord Diplock declared with reference to Community law that

[a] breach imposed by article 86 not to abuse a dominant position in the common market or in a substantial part of it, can [...] be categorised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty.⁴⁴³

However, this certainly implied that apart from the conditions set up under Community law, such a claim would also have to meet the traditional prerequisites required for a successful claim for breach of statutory duty under national law. Hence, it was essential for the claimant to show that Parliament had aimed to confer private rights of action and that the damage was of the kind intended to be protected by the statute. With respect to the standard of liability, contrary to the impression given in *X*

⁴⁴¹ As in CRAIG, "Once More Unto the Breach...", *supra* note 107, pp. 88-89.

⁴⁴² This possibility was suggested in the case *Garden Cottage*, *supra* note 409, 141.

⁴⁴³ *Ibid*, 141.

v. Bedfordshire, breach of statutory duty did not automatically imply strict liability. Instead, depending on the specific legislation in question the standard of liability could vary slightly.⁴⁴⁴ In addition to the restrictive elements drawn by the tort itself and its rather diffident application in the jurisprudence, the Community-based claim for damages would also need to be properly constructed and suitably modified to meet the requirements of EC law as outlined in the *Francovich* doctrine. Consequently, in its function of giving rise to the Community-based right to damages for breaches of EC law, a successful cause of action requires proof of a sufficiently serious breach of Community law. In light of all these aspects, it is obvious that there would have been a number of potential difficulties in conceptualising matters in this way.⁴⁴⁵

Last but not least, a third possibility which was considered in this context was to fit the claim for damages for breach of Community law under the heading of misfeasance in public office.⁴⁴⁶ However, considering the restrictive requirements which a claimant must show to bring a successful claim under this tort, this possibility was quickly ruled out as a viable option.⁴⁴⁷ The requirements of malicious, deliberate or injurious wrongdoing by a public authority simply make it rather difficult for an individual to establish a successful cause of action. Furthermore, in case of a breach of Community law by a public authority these stringent requirements could even render it “impossible or excessively difficult”⁴⁴⁸ for the applicant to obtain compensation. As a result, such a situation would clearly violate the principle of effectiveness, which constitutes, together with the principle of equivalence, the cornerstone of the maxim of national procedural autonomy of the Member States

⁴⁴⁴ For a general overview on liability in tort for breach of statutory duty see, *inter alia*, FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, pp. 36-41; CRAIG, *Administrative Law*, *supra* note 284, pp. 883 *et seq.* and ROBERT STEVENS, *Torts and Rights* (Oxford, Oxford University Press, 2007), pp. 113 and 223 *et seq.*

⁴⁴⁵ CRAIG, *Administrative Law*, *supra* note 284, p. 934.

⁴⁴⁶ On the tort of misfeasance in public office see FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, pp. 87 *et seq.*

⁴⁴⁷ STEVENS, *Torts*, *supra* note 444, pp. 242-243.

⁴⁴⁸ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 67.

under Community law.⁴⁴⁹ In line with the concerns raised above, the CJEU has repeatedly underlined that subjecting the damages claim in an analogous manner to specific rules of national law could in itself undermine the effective protection of the individual's right to damages.⁴⁵⁰ This could be the case whenever national law requires the claimant to comply with a series of elements in addition to the conditions set up under EC law for such claims.⁴⁵¹

Thus, due to the specific structure of English tort law and the restrictions inherent in domestic torts, it was rather unlikely for the courts to find close substantive and procedural parallels between the individual right to damages under European Community law and the prevailing remedial claims in the UK.⁴⁵² In addition, the assessment of a breach of EC law had to be undertaken in a way which was novel to English law. Therefore, already in 1989 the Divisional Court ruled in accordance with the CJEU's dictum in *Brasserie du Pêcheur*⁴⁵³, when it described the cause of action for a violation of Community law as *sui generis* even though "of the character of a breach of statutory duty."⁴⁵⁴ Moreover, in one of the first cases after the *Factortame* ruling, *Three Rivers District Council v. Bank of England (No. 3)*, Mr Justice Clarke once again confirmed the CJEU's opinion on this matter when he stated that

[i]n such a case the claim should not be regarded as a claim for damages for the tort of misfeasance in public office, but rather as *a claim of a different type not known to the common law*, namely a claim for damages for breach of a duty imposed by Community law or for the infringement of a right conferred by Community law.⁴⁵⁵

⁴⁴⁹ CRAIG, "Once More Unto the Breach...", *supra* note 107, p. 88.

⁴⁵⁰ On the principle of effectiveness see, *inter alia*, C-46 & 48/93, *Brasserie*, *supra* note 4, para. 67.

⁴⁵¹ CLIVE LEWIS, *Judicial Remedies in Public Law* (London, Sweet & Maxwell, 2000), p. 527.

⁴⁵² *Ibid*, p. 529.

⁴⁵³ C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 1 *et seq.*

⁴⁵⁴ *R. v. Secretary of State for the Home Department, ex parte Factortame (no. 5)* [1998] 1 CMLR 1353, p. 1421, para. 174.

⁴⁵⁵ *Three Rivers District Council v. Bank of England (no. 3)* [1996] 3 All ER 558, 624c-e (emphasis added).

Only recently, the very same issue was raised once again in the context of the *Köbler* case. The debate naturally focused on the question to what extent the legal system of England and Wales would be able to absorb liability claims for judicial violations of European Community law. As stated above, one can generally detect a strong support in the case-law post-*Brasserie du Pêcheur* and *Factortame* in the UK for the view that the courts do not actually feel the need to fit these cases into one of the pre-existing domestic heads of liability. In this sense, judicial practice in the UK provides strong support for the idea of an autonomous cause of action under the heading of ‘Euro-tort’. As a consequence of that development, the remedial structure in England and Wales forged two parallel and yet independent remedial paths. It is therefore clearly divided today between cases with or without a Community law component. In line with the country’s strict dualist tradition, the emergence of such a twin-track system in this context implies that under national law the applicable remedial framework differs entirely with respect to cases of State liability for breaches of Community law on the one hand and instances of State responsibility caused by a violation of domestic law on the other. In other words, the Euro-tort in the UK, which applies only to cases with a Community law component, leaves untouched the residue of the rule, which denies the availability of a similar remedy under domestic law. Accordingly, this system leads to peculiar situations in which individuals suffering loss as a result of a breach of EC law have an avenue for redress, while those experiencing harm caused by a violation of purely domestic law remain without a remedy.⁴⁵⁶ Hence, depending on whether a Community law element is involved in a specific case will be decisive for the degree of protection and the remedial path available to the harmed individual under the national legal system of England and Wales.

c) Spill-over effect into domestic law?

In view of the emergence of a separate remedial track under national law for violations of Community law by public authorities in the UK, an interesting question arises in this context, namely as to whether, and if so, in what way, the *Francovich*

⁴⁵⁶ AMOS, "Eurotorts and Unicorns," *supra* note 436, p. 124.

case-line by the CJEU might over time have (had) an impact on the corresponding situation under domestic law. After all, individuals in the UK are confronted with a total absence of an equivalent *Francovich*-type remedy under domestic law for harm caused to them by legislative or judicial acts. Moreover, with respect to administrative breaches the conditions for liability set up by the remedial framework under Community law are less restrictive than the strictly regulated scheme of torts in the UK. Accordingly, in a recent scoping paper, the Law Commission even spoke of an existing ‘gap’ in English law, referring to the absence of a remedy under domestic law in cases when a public authority acted unlawfully, but not in breach of EC law or of the ECHR.⁴⁵⁷ Even though the public act might have caused harm to an individual in such a case, he or she does not have a general cause of action under domestic law upon which to base a liability claim against the State, unless the case conforms to the additional conditions required under the different heads of tort.⁴⁵⁸

It is obvious that domestic courts are not bound by EC law in cases where there is no point of Community law in issue. Equally, the liability standards set up by the CJEU will have no direct impact on cases which are purely based on domestic law. However, even in cases without an explicit Community law component, it is plausible that judges could have regard to the EC-related jurisprudence when developing domestic case law.⁴⁵⁹ In this manner, the remedial track provided for individuals under national law in case of a breach of Community law by a public authority might spill over into the parameters of liability established under English tort law.⁴⁶⁰ After all, from the point of view of the harmed individual, it seems unsatisfactory and rather arbitrary that the (non-)availability of a remedy under national law depends merely on whether the factual circumstances of a case happen to contain a Community law element or not.⁴⁶¹ Therefore, it would be feasible that the application of *Francovich*-

⁴⁵⁷ The Law Commission, *Remedies against public bodies: A Scoping Report*, 10 October 2006 [accessible at www.lawcom.gov.uk/docs/remedies_scoping_report.pdf], p. 6, para. 2.19 *et seq.*

⁴⁵⁸ *Ibid.*, p. 7, para. 2.20.

⁴⁵⁹ CRAIG, *Administrative Law*, *supra* note 284, pp. 934-935.

⁴⁶⁰ Used accordingly in CRAIG, "Once More Unto the Breach...", *supra* note 107, p. 89 and ANAGNOSTARAS, "The principle of state liability...", *supra* note 100, p. 302.

⁴⁶¹ The same argument is raised in DEAKIN *et al.*, *Tort Law*, *supra* note 339, p. 438: With reference to the constantly growing *Francovich* line of cases, the authors stated that "if extensions to these torts take

style remedies in the legal system of England and Wales creates an incentive for change under domestic law or even spurs reforms to 'soften up' the dismissive approach towards specific instances of State liability in the UK.⁴⁶² Seventeen years after the CJEU's *Francovich* ruling, did the anticipated spill-over effect really happen or is this effect merely an illusion and wishful thinking by academics? And if it really occurred, did it lead to notable changes in the UK's legal framework of State liability? Even if it did not, the debate on possible reforms of the system of torts in the UK is alive and well. Over the years, concrete proposals for a general overhaul of the system have been put forward and Community law has undoubtedly played a significant role in this process. Furthermore, the impact of EC law has started to show in the jurisprudence of the national courts and even manifested itself in cases which did not relate directly to Community law.⁴⁶³ In March 2005 the Law Commission eventually launched a substantial reform project to review the law of remedies against public bodies in the UK.⁴⁶⁴ The publication of the aforementioned scoping report on 10 October 2006 marked the first stage of what is designed to be an ambitious roadmap for reform.⁴⁶⁵ Already the question at the centre of the project reveals the wide scope of the envisaged changes: "When and how should the individual be able to obtain redress against a public body that has acted wrongfully?"⁴⁶⁶

One of the key aims of this study by the Law Commission is to discuss and evaluate the introduction of a new head of liability in the UK for simple *ultra-vires*

place within the context of Community law, it would be anomalous (and unjust) not to make parallel extensions in areas of common law liability not touched on by Community law."

⁴⁶² CRAIG, *Administrative Law*, *supra* note 284, pp. 317-318.

⁴⁶³ The influence of Community law is noticeable in cases such as *Re McC*, *supra* note 376, and *Three Rivers District Council v. Governor and Company of The Bank of England* [2001] UKHL 16, para. 76. On the latter case see LUNNEY and OLIPHANT, *Tort*, *supra* note 339, pp. 629 *et seq.* and FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, p. 95.

⁴⁶⁴ See the project proposal as included in the Law Commission's Ninth Programme of Law Reform (March 2005), paras. 3.39 to 3.50. A full-text version, as well as a summary of the Ninth Programme of Law Reform are available under www.lawcom.gov.uk/programmes.htm.

⁴⁶⁵ For detailed information on the Law Commission's project and related documents see www.lawcom.gov.uk/remedies.htm.

⁴⁶⁶ See *Scoping Report (2006)*, *supra* note 457, part V, para. 5.1. under www.lawcom.gov.uk/docs/remedies_scoping_report.pdf.

acts committed by public authorities.⁴⁶⁷ As we have underlined several times in the course of this analysis, so far according to the principles of tort law, illegality which causes loss does not *per se* lead to liability in negligence.⁴⁶⁸ Instead, compensation can only be awarded if the authority's act can be subsumed under one of the existing heads of tort in the UK. For the first time such a possibility had been introduced through the incorporation of the European Convention on Human Rights into domestic law by the Human Rights Act 1998. Referring to this crucial momentum in the development of tort law, the Law Commission's scoping report of 2006 notes that

[t]o allow an action for damages [...] would be a radical departure from the existing law, almost certainly requiring legislation. Such a change would move English law towards the system of French administrative law, where the liability of public bodies is founded upon 'fault' and mere illegality is in itself a fault capable of giving rise to liability without more, and towards EU law.⁴⁶⁹

Apart from the proposed additions to the existing heads of tort in the UK, the project also aims to incorporate the most recent developments in EU law as well as under the Human Rights Act 1998 with respect to the general concept of public liability on tort into the existing remedial framework. Moreover, the reform proposal touches upon various other issues such as alternative remedies, statutory compensation schemes (including miscarriages of justice and criminal injuries compensation), as well as *ex gratia* payments.⁴⁷⁰ Furthermore, the Law Commission plans to study the interrelationship between different routes of redress and also aims to include an analysis of the element of fault as applied under European as opposed to domestic law in this context. Eventually, the Law Commission expects to propose a draft bill on the envisaged changes in the summer of 2009.

⁴⁶⁷ Discussed under Ibid, p. 28, paras. 3.57 *et seq.*

⁴⁶⁸ See for example the judgment in X, *supra* note 342, which explicitly confirmed this fact.

⁴⁶⁹ *Scoping Report (2006)*, *supra* note 457, p. 29, para. 3.61.

⁴⁷⁰ See Ibid, pp. 32-41.

Even though opinions may differ as to the extent to which Community law has had a direct and lasting impact on the remedial framework in the UK so far, it is undeniable that EC law does not remain unnoticed in the courts' day to day work and that changes induced by Community law are currently under way in Britain. Recent developments under national law also bode well for the reception of the enlarged *Francovich* doctrine after *Köbler* into the remedial framework of the UK. Thereby, a Community-enhanced spill-over effect could possibly spur reform for the development of a remedial track for breaches of domestic law committed by the legislature and the judiciary in the UK too.

II. Crown Liability for Judicial Breaches after *Köbler*?

1. Preliminary reflections on possible theoretical foundations

On the basis of the *Francovich* doctrine and in line with *Köbler*, a remedy in damages will have to be provided in the United Kingdom for cases when an individual has suffered loss as a result of an erroneous decision by the House of Lords or any other national court infringing an established right under EC law. According to the principle of national procedural autonomy, individuals have to be able to enforce their Community rights before domestic courts and “in the absence of Community rules on this subject”⁴⁷¹ also have to be given the possibility of pursuing their claim on the basis of the applicable provisions of the national procedural law of each Member State. In this context the CJEU has repeatedly underlined that the respective remedial path under the national procedural framework of each Member State has to meet the double standards of effectiveness and equivalence.⁴⁷² In other words, it is for the Member State “to designate the competent courts and lay down the detailed

⁴⁷¹ Case 33/76, *Rewe-Zentralfinanz*, *supra* note 143, para. 5.

⁴⁷² ADRIAN A.S. ZUCKERMAN, "Appeal to the High Court against House of Lords Decisions on the Interpretation of Community Law - Damages for Judicial Error" (2004) *C.J.Q.* 23 (Jan), pp. 8 *et seq.*

procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law.”⁴⁷³

Due to the absence of an established State liability regime for violations of the judiciary under the legal system of England and Wales, an appropriate cause of action will have to be established so as to allow the wronged individual to pursue his or her claim *à la Köbler* before the ordinary courts. The problem that remains to be solved in this context is whether such a cause of action should be modelled on any of the existing heads of liability in the UK. That is to say when there is no suitable basis under domestic law, an entirely new remedial track will have to be created in order to ensure the full effectiveness of the right to a remedy as guaranteed under Community law. A similar situation had already occurred in the UK in the context of the *Factortame* litigation, which eventually led to the introduction of the new Euro-tort under the legal system of England and Wales. Already at that time, the courts in the UK provided strong support for the idea of an autonomous cause of action. In a similar vein, a liability claim *à la Köbler* would most likely follow the remedial scheme already established in the UK for legislative breaches of Community law after the CJEU’s famous joint ruling in *Brasserie du Pêcheur/Factortame*.⁴⁷⁴ After all, the situation under domestic law after the *Köbler* ruling in the UK is almost identical to the legal situation back then, when we were faced with a complete absence of an equivalent remedy for legislative breaches under national law.

2. Maharaj v. Attorney-General of Trinidad and Tobago (no. 2)

An encouraging sign for a possible development towards the legal recognition of the concept of State liability for erroneous judicial conduct in the UK emerged in the judgment of the Privy Council in *Maharaj v. Attorney-General of Trinidad and Tobago (no. 2)*.⁴⁷⁵ Even though the ruling was given nearly thirty years ago, it remains a unique and groundbreaking precedent with respect to the question of State liability

⁴⁷³ C-224/01, *Köbler*, *supra* note 1, para. 46. See also Case 33/76, *Rewe-Zentralfinanz*, *supra* note 143, para. 5.

⁴⁷⁴ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 1 *et seq.*

⁴⁷⁵ On this ruling see also TONER, "Thinking the Unthinkable...", *supra* note 100, pp. 186 *et seq.*

for damages incurred by an erroneous judicial act. The case's importance is also mirrored in the fact that the Law Commission could not fail to comment upon it in 2000 in its report marking the enactment of the Human Rights Act 1998.⁴⁷⁶ Before going into the substance of the case it should, however, be clarified that the Judicial Committee of the Privy Council constitutes the final appeal to Her Majesty in Council for a number of Commonwealth countries, including the independent Republic of Trinidad and Tobago. The rulings of the Privy Council are not binding on courts in England and Wales, but they are considered as highly persuasive, not least because the judges of the Privy Council are usually members of the House of Lords. In the same manner, opinions handed down by the Judicial Committee of the Privy Council are no longer necessarily binding on the courts of other Commonwealth countries, but they are usually of such persuasive authority as to be followed by them.⁴⁷⁷

The significance of the *Maharaj* ruling lies in the fact that in it the Privy Council managed to convey in a perspicuous manner the theoretical concept underlying the liability of the State for breaches of law committed by the national judiciary. Moreover, due to the clear and concise reasoning of the Privy Council, the case could well serve as a valid archetype when it comes to the debate on a general recognition and on the precise application of such a principle under domestic law in the United Kingdom.⁴⁷⁸ Thus, the ruling constitutes without doubt a strong authority for the principle of State liability for erroneous judicial acts.⁴⁷⁹ The fact that the judgment was handed down in the Privy Council's function as highest court for Trinidad and Tobago certainly does not reduce the significance this ruling has for the UK in terms of the guidance it offers for introducing the principle of State liability for

⁴⁷⁶ The Law Commission and the Scottish Law Commission, *Damages under the Human Rights Act 1998: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (LAW COM No. 266, SCOT LAW COM No. 180), SE/2000/182, October 2000 [accessible at www.lawcom.gov.uk/docs/lc266.pdf], p. 182, paras. A.28 *et seq.*

⁴⁷⁷ For further details on the composition of the Judicial Committee of the Privy Council and its jurisdiction see www.privycouncil.org.uk/output/page5.asp.

⁴⁷⁸ Section 2(5) of the Crown Proceedings Act precludes entirely the application of this principle under domestic law in the UK. However, the proposed framework might be of avail to facilitate the enforcement of such a right to a remedy in the context of cases, which go beyond purely domestic law.

⁴⁷⁹ In this way also ABIMBOLA A. OLOWOFOYEKU, "State Liability for the Exercise of Judicial Power" (1998) *Public Law*, pp. 452 *et seq.*

judicial breaches in a country where the judiciary generally enjoys total immunity and protection.

The *Maharaj* case⁴⁸⁰ itself concerned a barrister who, while engaged in a case in the High Court of Trinidad, was imprisoned for contempt of court. Immediately after his arrest, the plaintiff applied to the High Court under section 6 of the Constitution of Trinidad and Tobago,⁴⁸¹ claiming redress for an alleged violation of his right not to be deprived of his liberty except by due process of law. The latter was a principle enshrined in section 1(a) of the Constitution.⁴⁸² However, the court dismissed his motion and ordered the barrister to serve his designated term of imprisonment. After his release, the claimant lodged an appeal, which was however dismissed by the Court of Appeal. Additionally, the barrister had also obtained leave to appeal to the Judicial Committee of the Privy Council against the judge's initial committal order.⁴⁸³ The Privy Council quashed the judge's initial order on the ground that a fundamental failure of natural justice had been committed in the course of the proceedings. As held by the Privy Council, the competent judge in the case had failed to inform the appellant in a detailed and explicit manner about the nature and the substance of the contempt of which he was charged. The subsequent deprivation of liberty without due process of law had therefore violated the appellant's constitutional rights.⁴⁸⁴

⁴⁸⁰ *Maharaj* (PC), *supra* note 365, 385 *et seq.*

⁴⁸¹ Section 6(1) [now s. 14] of the Constitution of Trinidad and Tobago: "For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of the foregoing sections or section of this Constitution has been, is being, or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for *redress*." (emphasis added). As in *Ibid*, 393.

⁴⁸² Section 1(a) [now s. 4(a)] of the Constitution: "It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof *except by due process of law* [...]" (emphasis added). See *Ibid*, 393.

⁴⁸³ As stated above, the Judicial Committee of the Privy Council constitutes the court of final appeal for the UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee. From the independent Republic of Trinidad and Tobago an appeal lies to the Judicial Committee. For further details on the jurisdiction of the Judicial Committee of the Privy Council see www.privycouncil.org.uk/output/Page32.asp.

⁴⁸⁴ According to Lord Diplock it constitutes a fundamental rule of natural justice "that a person accused of an offence should be told what he is said to have done plainly enough to give him an opportunity to

Furthermore, the Privy Council argued that since the appellant had been deprived of his liberty without due process in contravention of section 1 of the Constitution, he was entitled to obtain redress from the State.⁴⁸⁵ According to section 6(1) of the Constitution the claim for damages was “a claim against the State directly and not vicariously for something done in the exercise of its judicial power”.⁴⁸⁶ The ruling declared that redress had to consist of monetary compensation since it was the only practicable form of redress available in this case.⁴⁸⁷ In essence, section 6 of the Constitution in fact provided a new remedy even against unlawful judicial conduct. The question of what sort of liability had been imposed on the State under section 6 of the Constitution was addressed by Lord Diplock. He confirmed the general application of the principle of primary State liability in the specific case and defined this new form of redress as follows:

The claim for redress under s. 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability: it is a liability of the state itself. It is not a liability in tort at all: it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6(1) and (2) of the Constitution.⁴⁸⁸

Even though the judgment spawned the principle of State liability for judicial breaches of law, it was nevertheless a concept whose application was subject to rather restrictive criteria. First of all, the rule immunizing judges from personal liability while acting in their judicial capacity remained entirely unaffected by this ruling. In his Opinion, Lord Diplock explicitly underlined the limited scope of application for this new form of redress. Besides the fact that the application of such remedy was

put forward any explanation or excuse that he may wish to advance.” See Lord Diplock in *Maharaj* (PC), *supra* note 365, 391.

⁴⁸⁵ According to s. 6 of the Constitution of Trinidad and Tobago redress is defined as “[r]eparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this.” *Ibid*, 398.

⁴⁸⁶ *Ibid*, 671e-f.

⁴⁸⁷ *Ibid*, 398.

⁴⁸⁸ Lord Diplock in *Ibid*, 399.

limited to cases infringing the human rights and fundamental freedoms enlisted under Chapter I of the Constitution, it was furthermore only applicable to errors of procedure amounting to “a failure to observe one of the fundamental rules of natural justice”.⁴⁸⁹ With respect to errors of fact or substantive law, the only remedy available to an individual against unlawful judicial conduct was to appeal. In case there was no higher court to appeal to, nobody could actually argue that there had been a judicial error at all.⁴⁹⁰ “The fundamental right is”, according to Lord Diplock, “not to a legal system that is infallible, but to one that is fair.”⁴⁹¹ On that note he concluded that it was only in the case of imprisonment or corporal punishment already undergone before an appeal could be heard, that the consequences of the judgment or order could not be rectified through an appeal to the appellate court.⁴⁹²

The solution suggested by the Privy Council in *Maharaj* displays two substantial advantages. While it imposes no personal liability on the judicial officer, it still provides an effective remedy to the individual, who would have otherwise been left without any form of redress. Moreover, even though this solution generally allows the claimant to seek redress for irreparable damage caused by a judicial act, it is nevertheless limited in its application to cases involving fundamental failures of justice that amount to a denial of due process and/or a violation of constitutional rights. Despite the fears voiced by Lord Hailsham in his dissenting opinion that the ‘*Maharaj* type of liability’ would lead to a flood of liability claims, Lord Diplock rightly stated that even if an error existed which justified the reversal of a judicial decision, that failure would not in itself be enough to evoke liability *à la Maharaj*. This would especially hold for cases in which the consequences of the judicial act could still be corrected on appeal.⁴⁹³ The specific construction developed in *Maharaj* and its theoretical underpinning of primary State liability provided a convincing

⁴⁸⁹ Lord Diplock in *Ibid*, 399. See also OLOWOFOYEKU, “State Liability...,” *supra* note 479, p. 453.

⁴⁹⁰ The only exception, which could possibly amount to such a violation, were errors in procedure, which violated one of the fundamental rules of natural justice and which resulted in a person being deprived of life, liberty, security of the person, or enjoyment of property. *Maharaj* (PC), *supra* note 365, 399.

⁴⁹¹ *Ibid*, 399.

⁴⁹² Lord Diplock in *Ibid*, 399.

⁴⁹³ Lord Diplock in *Ibid*, 399. See also OLOWOFOYEKU, “State Liability...,” *supra* note 479, p. 454.

solution in this case. Applauding the decision, Olowofoyeku concluded that on the basis of this judgment “the Privy Council not only has provided a precedent for the liability of the State for judicial acts but also has presented a sound theoretical basis for such liability.”⁴⁹⁴

However, while this principle had been successfully applied under the constitutional framework of Trinidad and Tobago, a parallel application of it under the legal system of England and Wales would come up against a number of legal barriers. After all, two traditional impediments immediately stand in the way of applying the *Maharaj* principle in the UK. First, the fact that a judicial error is not considered a tort in the UK and second, the fact that judges are not presumed to be servants of the Crown (State) for the purposes of vicarious liability in tort. In addition to the aforementioned obstacles, there is also an important statutory impediment, which would eliminate any attempt to establishing primary State liability for wrongful judicial acts in Britain. Even though the Crown Proceedings Act 1947 had waived the Crown’s immunity from tortious liability, section 2(5) of the Act nevertheless provided an exemption from liability whenever the alleged violation was of a judicial nature.⁴⁹⁵ Hence, section 2(5) of the CPA represents an insurmountable obstacle to individuals seeking to obtain redress against the Crown for damage caused by an erroneous judicial act in cases which do not themselves possess any Community law component.

It might seem like the exception in section 2(5) of the CPA constituted the final word on this matter, especially if the Act was interpreted to preclude all claims of State liability for judicial acts. However, in this respect the impact of supranational law such as the European Convention on Human Rights and the direct implications of Community law on the domestic legal framework significantly changed this seemingly irrevocable legal stalemate. The first exceptions to the strict immunity of the judiciary in the UK emerged under the Human Rights Act 1998, which incorporated parts of the European Convention on Human Rights under the legal

⁴⁹⁴ OLOWOFOYEKU, *Suing Judges*, *supra* note 354, p. 170.

⁴⁹⁵ Section 2(5) CPA 1947.

system of England and Wales. Similar changes have also been induced by Community law. In other words, tort law in the UK is undeniably changing and the stimulus for this development is coming from supranational legal sources. Hence, the reasoning and the conclusions of the Privy Council in the *Maharaj* ruling could serve as a sound theoretical basis in the UK to accommodate the current changes under domestic law, which are accruing from the recent developments on the Community level and especially the CJEU's ruling in *Köbler*.⁴⁹⁶

3. State (Crown) liability for judicial breaches in the context of the European Convention on Human Rights

An aspect which plays an important role throughout this entire analysis is the comparison of the framework of State liability for judicial breaches under national law and EC law with the system established under the ECHR,⁴⁹⁷ to which the CJEU and various Advocates General have repeatedly referred throughout the established case-law on the question of Member State liability for breaches of Community law since *Francovich*.⁴⁹⁸ With respect to the newly established principle of Member State liability for judicial breaches under EC law it is therefore hardly surprising to discover that in the course of its deliberations in *Köbler* the CJEU once again explicitly hinted at the general principles of State responsibility as applied under the ECHR, and especially as contained in Article 41 of the Convention.⁴⁹⁹

The significance of the ECHR in this context is certainly not confined to the UK's legal system or merely to the countries included in group I, but instead extends

⁴⁹⁶ On the influence of comparative law on the legal system of England and Wales see also FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, pp. 273 *et seq.*

⁴⁹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol no. 11, Council of Europe, February 2003; hereinafter referred to as "ECHR" or "the Convention". A full-text version of the ECHR is available at www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/The+European+Convention+on+Human+Rights+and+its+Protocols/.

⁴⁹⁸ C-224/01, *Köbler*, *supra* note 1, para. 49. See especially the frequent references to the ECHR in the various Opinions of Advocate General Léger in this context: Opinion, Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, paras. 49 *et seq.*; Opinion, Advocate General Léger in C-5/94, *Hedley Lomas*, *supra* note 95, para. 60.

⁴⁹⁹ C-224/01, *Köbler*, *supra* note 1, para. 49.

to the four groups of our classification and all the 27 EU Member States contained therein. Even though the European Union is not (yet) formally a Contracting Party to the ECHR,⁵⁰⁰ it is nevertheless obliged to respect the fundamental rights as outlined in the Convention as general principles of Community law.⁵⁰¹ Moreover, due to the fact that all individual EU Member States are parties to the ECHR, the developments on the Convention-level undoubtedly have at least implicit ramifications for the situation under Community law. It is clear that the influence of the ECHR in its EU-wide application is altogether too big a question to be pursued exhaustively within the confines of this thesis. Given the breadth of the topic, the following section will therefore be limited in scope and deal only with those aspects that are most relevant in the specific context of our project.

As suggested above, the case-law of the European Court of Human Rights⁵⁰² with respect to the application of the principle of State liability for judicial breaches is well established under the Convention-system and the practical examples are numerous.⁵⁰³ After the exhaustion of domestic remedies, the ECHR grants individuals direct access to the European Court of Human Rights to lodge complaints of harmful acts or omissions committed by national courts.⁵⁰⁴ The rule of prior exhaustion of domestic remedies also implies that in most cases only national judgments of final instance will reach the European Court of Human Rights.⁵⁰⁵ With reference to the possible violations of the Convention committed by the judiciary of a Contracting State, a distinction is generally drawn between breaches of the ECHR committed *in procedendo* as opposed to those violations of the Convention committed *in*

⁵⁰⁰ Article 6(2) of the Treaty on the European Union (TEU) explicitly ascertains that the EU shall eventually accede to the European Convention on Human Rights.

⁵⁰¹ As declared in Article 6(3) TEU: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

⁵⁰² Hereinafter also referred to as "ECtHR".

⁵⁰³ See, for instance, judgments such as *König v. Germany*, judgment of 28 June 1978, Series A no. 27; *Zimmermann and Steiner v. Switzerland*, judgment of 13 July 1983, Series A no. 66; *Dulaurans v. France*, no. 34553/97, 21 March 2000; *Tsirlis and Kouloumpas v. Greece*, judgment of 29 May 1997, Reports of Judgments and Decisions 1997 III or *Karakasis v. Greece*, no. 38194/97, 17 October 2000.

⁵⁰⁴ Article 34 ECHR.

⁵⁰⁵ See admissibility criteria under Article 35(1) ECHR.

iudicando.⁵⁰⁶ The first of these two categories of breaches refers specifically to judicial violations of one of the procedural guarantees enshrined in the ECHR, the most prominent of which is certainly Article 6(1) of the Convention. Furthermore, judicial violations of the ECHR can also be committed *in iudicando*, which implies that a national court violated a substantive right protected under the ECHR such as to adversely affect the content of a final judgment. In the past examples of such cases included, *inter alia*, violations of Article 8 of the Convention,⁵⁰⁷ which protects the fundamental right to respect for private and family life, or breaches of Article 10 ECHR,⁵⁰⁸ which concerns the right to freedom of expression.

A prominent case in point, which highlights the implicitness of the European Court of Human Rights (ECtHR) when holding a State liable on the grounds of a violation of the Convention, but at the same time demonstrates the difficulties involved in identifying the perpetrator of the breach, is the case *Dangeville v. France*.⁵⁰⁹ In this judgment the ECtHR also raised a number of fundamental issues which reach beyond the mere demonstration of validity of the principle of responsibility of the State for judicial breaches of rights enshrined in the Convention. In relation to our topic, this case also deserves special attention as it deals with a court of last instance acting in breach of EC law. However, while the violation of Community law was implicitly confirmed in the ECtHR's judgment, the Court, similar to the CJEU's reasoning in the case *Commission v. Italy*,⁵¹⁰ did not explicitly distinguish between legislative and judicial acts in this context and subsequently failed clearly to identify the legislature and/or the judiciary as the perpetrator of the violation.

⁵⁰⁶ Cf. Opinion, Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 49. See TOM BARKHUYSEN and MICHIEL L. VAN EMMERIK, "Accountability of the Judiciary on the National Level for Violations of the European Convention on Human Rights" in G. Canivet *et al.* (eds.), *Independence, Accountability, and the Judiciary* (London, British Institute for International and Comparative Law, 2006), pp. 420 *et seq.*

⁵⁰⁷ See, for example, *P, C and S v. UK*, no. 56547/00, 16 July 2002.

⁵⁰⁸ See, for example, *Sunday Times v. United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30.

⁵⁰⁹ Case of S.A. *Dangeville v. France*, no. 36677/97, ECHR 2002-III.

⁵¹⁰ Case C-129/00, *Commission of the European Communities v. Italian Republic* [2003] ECR I-14637.

In light of the application of a unitary concept of the State under the Convention, the ECtHR is certainly not obliged to single out which branch of the State was responsible for the violation. Nevertheless, it remains without doubt that in *Dangeville* a national court of last instance committed a severe breach of EC law in the course of domestic proceedings. In the end, instead of invoking (the then still unknown) *Köbler*-liability under Community law, the State was held responsible on the grounds of a breach of Article 1 of Protocol No. 1 of the European Convention on Human Rights, which guarantees the peaceful enjoyment of property. The implications of this case for the framework of State liability for judicial breaches under the Convention, but also with regard to the recognition of a similar concept under Community law, will be discussed in the following section.

a) The case *S.A. Dangeville v. France*

The case *S.A. Dangeville v. France* deals with the violation of Article 1 of Protocol No. 1 of the Convention by the French *Conseil d'Etat* and is, as stated above, yet another example for a breach of the ECHR by a national supreme court. The case revolved around a French company of insurance brokers, S.A. Dangeville, which invoked a tax exemption in France on the basis of the Sixth VAT Directive⁵¹¹ in all national instances, but was eventually denied such an exemption in the last instance by the *Conseil d'Etat*. It is crucial to highlight at this point that France had failed to transpose the relevant VAT Directive within the prescribed time-limit. Furthermore, the *Conseil d'Etat* did not yet recognize the direct effect of EC Directives and consequently simply refused to give effect to the directly applicable rights contained therein.⁵¹²

In the meantime another firm of insurance brokers had brought an identical claim before the French courts. The factual and legal circumstances in the two cases were exactly the same differing only with respect to the later submission date of the

⁵¹¹ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes.

⁵¹² *Dangeville*, *supra* note 509, paras. 16 *et seq.*

second claim, which was lodged a few months after Dangeville had brought its case to court. For various reasons the proceedings in the second case stretched over some time and when the *Conseil d'Etat* eventually gave its decision in the case, it had meanwhile acknowledged the direct effect of EC Directives. In fact, the *Conseil* ruled in favour of the second applicant and granted the desired tax exemption to Dangeville's competitor.⁵¹³ At that point, however, Dangeville had already lodged a second application in order to claim its right on the basis of the change in the *Conseil*'s case-law concerning the direct applicability of EC Directives. Dangeville lodged a liability claim against France before the *Conseil d'Etat*, in which it requested compensation to the amount of the exemption denied. Even though the *Conseil d'Etat* had delivered a favourable judgment in the case of Dangeville's competitor on the same issues of law, the *Conseil* dismissed Dangeville's liability claim out of compliance with the authority of *res judicata* of its previous judgment in the case.⁵¹⁴

Eventually the company lodged an application with the European Court of Human Rights, in which it alleged a violation of its right of property as guaranteed under Article 1 of Protocol No. 1 of the ECHR. The ECtHR subsequently considered the right to restitution of wrongfully paid tax as a 'possession' within the meaning of that Article. Moreover, the Court declared that Dangeville's claim for State liability had been legitimate and argued that a refusal to rebate the amount of money to the company concerned infringed the right of property guaranteed by Article 1 of Protocol No. 1.⁵¹⁵ What is also interesting in this case is that the ECtHR entirely disregarded the plea of *res judicata*, which had been raised by the *Conseil d'Etat* and instead added authority to the principle of direct effect and primacy of EC law. Accordingly, France had to compensate the applicant for a violation of its right to property, which had been committed by the French *Conseil d'État*.⁵¹⁶

⁵¹³ Ibid, para. 27.

⁵¹⁴ Ibid, para. 25.

⁵¹⁵ Ibid, para. 51.

⁵¹⁶ Ibid, paras. 61 and 70.

On something of a side note, it should be underlined at this point that the decision in *Dangeville v. France* also sparked some interesting observations on the general principle of *res judicata*, which is – as previously demonstrated – frequently used as an argument against possible State liability claims for judicial breaches under European Community law and which was in the present case overruled by the ECtHR.⁵¹⁷ With reference to the maxim of *res judicata*, which we will scrutinise in chapter VI of our project, *Dangeville* also constitutes the perfect example for those cases, to which Advocate General Geelhoed recently referred in the *Lucchini* case, where he stated in his Opinion of 14 September 2006 that

[i]t is evident from comparative research, however, that, despite the major importance to be attached to *res judicata*, its effect is not absolute. The various national legal systems permit exceptions to *res judicata*, albeit subject to strict conditions. This may be the case, for example, in the event of fraud or if a flagrant breach of fundamental rights is committed in the judgment which has become inviolable. The case-law of the European Court of Human Rights shows that *res judicata* cannot cover over any obvious violations of fundamental (Community) rights.⁵¹⁸

In the ECtHR's judgment in *Dangeville*, France as a party to the Convention was finally ordered to compensate the applicant for a breach of the Convention. Even though the ECtHR does not clearly identify the perpetrator of the breach in the wording of the judgment, it is obvious that the *Conseil d'État* could have remedied the failure of the legislature to adequately transpose the EU Directive by rendering its provisions directly effective in the specific case. The *Conseil*'s refusal to do so certainly amounted to an error attributable to it. By acknowledging the principle of State liability for judicial breaches under the Convention-system in the specific EU-law related case of *Dangeville*, the ECtHR also might have helped to set the tone for

⁵¹⁷ See Opinion of Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 20. An elaborate analysis of the maxim of *res judicata* in the context of the principle of State liability for judicial breaches will be provided in chapter VI, pp. 385 *et seq.*

⁵¹⁸ Opinion, Advocate General Geelhoed in the Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA, formerly Lucchini Siderurgica SpA* [2007] ECR I-6199, para. 37.

the enactment of a similar concept under Community law. In this sense, *Dangeville* was in certain respects instrumental in paving the way for the recognition of the *Köbler* principle under Community law.⁵¹⁹

While we will elaborate further on the foregoing considerations concerning the principle of *res judicata* at a later point in our analysis,⁵²⁰ the imminent question, which arises with respect to our current model is a different one: how is the Convention and its application to the judiciary received in a country where the judicial branch generally enjoys absolute immunity from suit and where a principle of State liability for judicial breaches is explicitly precluded by law? And if the principle of State liability for judicial breaches of the ECHR nevertheless happens to be fully applicable under domestic law in the UK, could the prevailing situation with respect to such breaches of the Convention possibly provide us with suggestions, guidelines or even solutions on how to implement the *Köbler* principle in the legal system of England and Wales? In other words, is it possible to draw an analogy to Community law in this context?⁵²¹

b) The Human Rights Act 1998 and its application to judicial breaches

Prior to the enactment of the Human Rights Act 1998, the ECHR was not directly enforceable in the UK. While it was accepted that national courts increasingly had regard to the Convention in their jurisprudence, and to a certain extent interpreted common law in accordance with the ECHR, it was not until the Human Rights Act 1998 that the obligation to adjudicate while taking account of the principles and rights protected under the ECHR (as developed by the Strasbourg organs) was eventually put on a statutory basis in the UK.⁵²² The HRA 1998 did, however, not incorporate parts of the ECHR directly into domestic law, but instead required the courts to

⁵¹⁹ In this context see also HOFSTÖTTER, *Non-compliance...*, *supra* note 88, pp. 71 *et seq.*

⁵²⁰ See chapter VI, pp. 385 *et seq.*

⁵²¹ As the focus of this chapter lies on the countries contained in group I of our classification scheme, the following analysis on the ECHR will also concentrate predominantly on these countries and their related case-law in this context.

⁵²² CRAIG, *Administrative Law*, *supra* note 284, pp. 568 *et seq.*

interpret legislation “so far as it is possible to do so” in accordance with the Convention.⁵²³ What remained in dispute in this context was the precise nature of the cause of action arising under UK law as a consequence of the adoption of the HRA 1998.⁵²⁴

On the basis of the HRA 1998, a complaint can be lodged directly in front of UK courts by the victim of an allegedly unlawful action committed by public authorities. Accordingly, in case of a breach of those principles enshrined in the ECHR, the domestic courts are competent to grant just and appropriate remedy or relief to the victim.⁵²⁵ However, according to section 8(3) of the HRA the court may only award damages if it is convinced that the award is necessary to afford just satisfaction. Furthermore, the principles applied by the ECtHR concerning the award of compensation under Article 41 ECHR have to be taken into consideration by the national courts not only when deciding whether to award damages in a specific case, but also when assessing the amount of compensation.⁵²⁶ For the purposes of our study, we are especially interested to find out to the extent to which these rights and remedies are applicable to acts performed by the judiciary. In other words, the pivotal question remains one of whether judicial acts in the UK can be incompatible with rights guaranteed under the European Convention on Human Rights.

Section 6(1) of the Human Rights Act 1998 declares that it is unlawful for a public authority - including a court or tribunal⁵²⁷ - to act in a way which is

⁵²³ Section 3(1) of the HRA 1998. In this sense also DEAKIN *et al.*, *Tort Law*, *supra* note 339, p. 101.

⁵²⁴ *Damages under the Human Rights Act 1998*, *supra* note 476, p. 54, para. 4.20: “[S]ections 6 and 7 of the HRA create a new cause of action, which is in effect a form of action for breach of statutory duty, but with the difference that the remedy is discretionary, rather than as of right.” This view, however, did not remain unchallenged. In this context see also DEAKIN *et al.*, *Tort Law*, *supra* note 339, p. 440 and CRAIG, *Administrative Law*, *supra* note 284, p. 886.

⁵²⁵ Section 8(1) HRA: “In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.”

⁵²⁶ See s. 8(4) HRA.

⁵²⁷ Section 6(3)(a) HRA explicitly includes courts and tribunals under the general definition of public authority: “In this section ‘public authority’ includes
(a) a court or tribunal, and
(b) any person certain of whose functions are functions of a public nature,

incompatible with a Convention right. Henceforth, section 7(1) of the HRA bestows a right on the harmed individual to bring proceedings in case a public authority allegedly acted in such an unlawful manner as to violate the Convention. Even though on the basis of the definition in section 6(3)(a) also courts, as public authorities, have to act compatibly with Convention rights, restrictions have nevertheless been included in the HRA 1998 for cases when acts are performed by members of the judiciary in the UK. By virtue of section 9(1), proceedings under section 7(1) with respect to judicial acts can only be lodged in the exercise of a right of appeal, through an application for judicial review, or in any other forum as may be prescribed by the law.

c) The HRA and violations of Article 5(5) ECHR

Section 9(3) of the HRA 1998 contains the crucial component with respect to violations of the Convention by judicial acts. This provision explicitly forecloses the award of damages under the HRA in the UK on the grounds of a judicial act, which has been conducted in good faith. In other words, apart from one exceptional case, all individuals in the UK who have suffered harm as a result of a judicial violation of the Convention performed in good faith remain, at least on the basis of the HRA, without the possibility of receiving damages for their loss. The only case when damages for judicial breaches of the ECHR can actually be awarded under the HRA 1998 is “to compensate a person to the extent required by Article 5(5) of the Convention.”⁵²⁸ Article 5 protected the right to liberty and security of person and provides an exhaustive list of situations when someone may be lawfully deprived of their liberty (Article 5(1)). It also provides for the right to be told the reasons for one’s detention (Article 5(2)), to be brought promptly before a judge (Article 5(3)) and to challenge one’s detention (Article 5(4)). Article 5(5) ECHR is also a special provision within the Convention itself as it contains a separate provision expressly requiring domestic law to secure a right to compensation for someone who has been the victim of arrest

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.” On this aspect see also DEAKIN *et al.*, *Tort Law*, *supra* note 339, pp. 439-440.

⁵²⁸ Article 5(5) ECHR: “Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article [the right to liberty and security of person] shall have an enforceable right to compensation.”

or detention in contravention any of the other parts of Article 5 summarised above.⁵²⁹ According to section 9(4) and (5) HRA 1998 such an award is to be made not against the court directly, but against the Crown. Furthermore, the appropriate minister or government department has the right to join as a party to the proceedings.⁵³⁰

Generally speaking, the Human Rights Act severely restricts the liability of the Crown for judicial acts which contravene Convention rights. In fact, damages are merely available where an individual has been detained without lawful authority, such as unlawful arrest or detention, regardless of the judge's *bona fides*.⁵³¹ In all other cases the issue of the judge's *bona fides* has to be examined and nothing can be claimed if the judge is found to have acted in good faith, which tends to be the most likely outcome. Damages are merely available under the HRA in case the judicial act was committed by the judge(s) in bad faith. As mentioned before, the latter is an allegation which is extremely hard to prove.⁵³² This very fact had already been confirmed by Cappelletti in 1983 when he stated with reference to harmful judicial behaviour that "[i]ntention is the most difficult to prove – a '*probatio diabolica*' par excellence."⁵³³ For all other cases involving harmful acts committed by the judiciary a last option to obtain damages would be to recourse to the ECtHR under Article 41 of the Convention. According to this provision, the ECtHR can "afford just satisfaction" to an applicant in cases when the domestic law of a Contracting State to the Convention, like in the present case, the UK, does not grant full reparation for the

⁵²⁹ For a detailed analysis of all aspects surrounding Article 5 ECHR see, *inter alia*, JOHN WADHAM and HELEN MOUNTFIELD, *Human Rights Act 1998*, 2nd ed. (London, Blackstone Press Limited, 2000), pp. 77-84 as well as CHERIE BOOTH and DAN SQUIRES, *The negligence liability of public authorities* (Oxford/New York, Oxford University Press, 2006), paras. 11.35 *et seq.* See also the comments on Article 5 ECHR in the Law Commission's report of 2000 entitled *Damages under the Human Rights Act 1998*, *supra* note 476, pp. 96 *et seq.*

⁵³⁰ See s. 9(5) HRA 1998. See also ZUCKERMAN, "Appeal to the High...", *supra* note 472, p. 9.

⁵³¹ On the detailed application of Article 5(5) ECHR see, *inter alia*, the Law Commission's report on *Damages under the Human Rights Act 1998*, *supra* note 476, pp. 96, paras. 6.27 *et seq.* and WADHAM and MOUNTFIELD, *HRA 1998*, *supra* note 529, pp. 77-84.

⁵³² Section 9(3) HRA 1998: "In proceedings under this Act in respect of a judicial act done in good faith damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention." See also OLOWOFOYEKU, "State Liability...", *supra* note 479, p. 462.

⁵³³ CAPPELLETTI, "Who Watches the Watchmen?'...", *supra* note 177, p. 41.

violation of a Convention right.⁵³⁴ Generally speaking, one should, however, underline that in the past the ECtHR has interpreted Article 41 in a restrictive manner.

In sum, compensation for damages can only be awarded on behalf of the Crown if a judicial act violates the right to liberty and security as defined in Article 5 ECHR.⁵³⁵ In addition, a judicial act may not be challenged otherwise than by way of appeal or judicial review or (if any) under ministerial rules.⁵³⁶ The rationale behind these restrictions in the HRA 1998 with respect to judicial acts seems to be motivated by an attempt to avoid damages claims every time a judge makes a reasonable ruling on the basis of what he or she genuinely believes the law to be, but on appeal another court takes a different but equally reasonable view. From the claimant's perspective, however, the said restrictions to such a claim for damages under the HRA construe an almost insurmountable barrier in the UK. Even in the case that a judicial act is found to be in blatant violation of the Convention, the aggrieved party might still have no right to claim damages under the Human Rights Act.

With respect to the enactment of the *Köbler* doctrine under the legal system of England and Wales, the wording of section 9(3) HRA 1998 mirrors the deliberate intent still predominant under UK law to preserve the special status attributed to the judiciary, which includes the maxim of absolute immunity from suit for all acts performed by judicial officers. Similar to the restrictive approach in section 2(5) of

⁵³⁴ See, *inter alia*, *König*, *supra* note 503; For the Court's scheme of awarding damages under Article 41 ECHR see, for example, *Zimmermann et al.*, *supra* note 503; *Ceteroni v. Italy*, 22461/93; 22465/93 [1996] ECHR 53 (15 November 1996); *Mavronichis v. Cyprus*, 28054/95 [1998] ECHR 35 (24 April 1998); *S. R. v. Italy*, 31648/96 [1998] ECHR 34 (23 April 1998); *Estima Jorge v. Portugal*, 24550/94 [1998] ECHR 28 (21 April 1998); *Doustaly v. France*, 26256/95 [1998] ECHR 32 (23 April 1998) *et al.*

⁵³⁵ In this context see, for example, *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145 B; *Johnson v. the United Kingdom*, judgment of 24 October 1997, Reports of Judgments and Decisions 1997 VII; *Caballero v. the United Kingdom* [GC], no. 32819/96, ECHR 2000 II; *Curley v. the United Kingdom*, no. 32340/96, 28 March 2000; *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, Series A no. 182; *Steel and Others v. the United Kingdom*, judgment of 23 September 1998, Reports of Judgments and Decisions 1998 VII; *Stephen Jordan v. the United Kingdom*, no. 30280/96, 14 March 2000; *Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A no. 114; (Article 50), judgment of 5 October 1988, Series A no. 145 A; *Hussain v. the United Kingdom*, judgment of 21 February 1996, Reports of Judgments and Decisions 1996 I and *Chahal v. the United Kingdom*, judgment of 15 November 1996, Reports of Judgments and Decisions 1996 V.

⁵³⁶ Section 9(1) HRA 1998.

the Crown Proceedings Act 1947 with respect to the principle of Crown liability for judicial breaches, the Human Rights Act, which was enacted more than fifty years later, still does not show any significant changes concerning the awarding of damages for erroneous judicial acts under UK law. In light of these facts, it would probably be more than overly optimistic to anticipate a warm welcome for the *Köbler* doctrine under the legal system of England and Wales.

A prominent example in the possible line of violations of the Convention committed by national courts is Article 6(1) of the Convention, which declares that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁵³⁷ Without going into all the complex details surrounding the scope and the application of Article 6 with respect to both civil and criminal proceedings, it is obvious that the overall guarantees and standards of a fair trial under the ECHR also had serious implications for the system established in the United Kingdom.⁵³⁸ And, the ECtHR has repeatedly ruled that, for example, undue delay in court proceedings constituted a violation of Article 6, rulings which have been applied to English courts too.⁵³⁹ In such cases the reasonableness of the length of proceedings is however assessed separately in each case with regard to its particular facts.⁵⁴⁰ In view of the explicit wording of Article 6 of the Convention, it

⁵³⁷ Article 6(1) ECHR. For a detailed discussion of Art. 6 ECHR see, for example, WADHAM and MOUNTFIELD, *HRA 1998*, *supra* note 529, pp. 84-101.

⁵³⁸ Article 6 ECHR entails, among others, the overriding obligations of a fair hearing, the proper examination of all submissions, arguments and evidence, a trial to be held within a reasonable time and of impartiality of courts and tribunals etc. On the application of Article 6 ECHR especially in the UK see, *inter alia*, *Damages under the Human Rights Act 1998*, *supra* note 476, pp. 115 *et seq.*

⁵³⁹ For Article 6-related violations of the Convention under the legal system of England and Wales see, for instance, judgments such as *Findlay v. the United Kingdom*, judgment of 25 February 1997, Reports of Judgments and Decisions 1997 I; *Pullar v. the United Kingdom*, judgment of 10 June 1996, Reports of Judgments and Decisions 1996 III; *Sander v. the United Kingdom*, no. 34129/96, ECHR 2000 V; *McGonnell v. the United Kingdom*, no. 28488/95, ECHR 2000 II; *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247 B *et al.*

⁵⁴⁰ In contrast to the aforementioned judgments see *Buchholz v. Germany*, judgment of 6 May 1981, Series A no. 42, where a period of almost five years was held not to be unreasonable in violation of Article 6(1), and *Süßmann v. Germany*, judgment of 16 September 1996, Reports of Judgments and Decisions 1996 IV. Liability for acts of the British judiciary within the realms of the ECHR arises mostly on the basis of a violation of the freedom of speech, contempt of court or delay in judicial process. See, for example, *Sunday Times*, *supra* note 508; *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216 and *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, in all of which acts or omissions by the judiciary played a decisive role.

is therefore rather surprising that there is no special provision under English law, not even in the HRA 1998, recognizing the right to damages for victims of judicial breaches of Article 6. Moreover, in a joint report entitled ‘Damages under the Human Rights Act 1998’, which was published in October 2000 following the enactment of the HRA in the UK, the Law Commission and the Scottish Law Commission explicitly confirmed that “[a] breach of Article 6 would not be sufficient to provide a basis for a claim for damages in respect of judicial action”.⁵⁴¹

Even though the ECtHR has repeatedly condemned the UK for breaches of Article 6 in the course of court proceedings,⁵⁴² on a national level the situation appears to be different. A conviction may be overturned if any of the guarantees enshrined in Article 6 are breached during the course of an investigation, trial or punishment, though it is not automatic. However, in the course of national court proceedings victims of a violation of Article 6 will not be compensated in damages on the basis of the HRA 1998. Instead, it appears that domestically claims for damages in relation to Article 6 violations of the Convention are frequently subsumed under the heading of “miscarriages of justice” as regulated in section 133 of the Criminal Justice Act 1988, which allows for compensation for such miscarriages.⁵⁴³ Overall, the situation with respect to the awarding of damages for judicial breaches of Article 6 ECHR in the UK is not entirely clear and leaves open a number of unresolved issues.⁵⁴⁴

On this point the situation is rather similar in all the other countries pertaining to the first group of our classification scheme. While countries included in the remaining three categories generally recognize the principle of State responsibility for violations of the ECHR by the judiciary, group I is rather restrictive with respect to damages for judicial violations even when it comes to breaches of the Convention. Whereas

⁵⁴¹ *Damages under the Human Rights Act 1998*, *supra* note 476, p. 182, para. A.27.

⁵⁴² See, for example, *Perks and Others v. the United Kingdom*, nos. 25277/94, 25279/94, 25280/94, 25282/94, 25285/94, 28048/95, 28192/95 and 28456/95, 12 October 1999 and *Benham v. the United Kingdom*, judgment of 10 June 1996, Reports of Judgments and Decisions 1996 III.

⁵⁴³ Available under www.opsi.gov.uk/ACTS/acts1988/ukpga_19880033_en_14.

⁵⁴⁴ In our graph including all the Member States adhering to group I, for the UK we have therefore marked Article 6 ECHR with a question mark.

according to the HRA the UK has clearly restricted the State's responsibility for judicial breaches of the Convention to violations of Article 5(5) ECHR and to acts done in bad faith, other countries such as the Netherlands, Greece, Ireland and Bulgaria have adopted a similar, but less restrictive approach in this context. As mentioned before, all the countries included in our first group broadly reject the basic principle of State liability for judicial breaches under domestic law, save for a handful of exceptions. These exceptions usually concern two different groups of cases, the first of which are breaches of the ECHR. As mentioned before, the ECHR is applicable in all the countries included in the first group of our study and special provisions with regard to the Convention are usually provided under the legal system of each Member State. By restricting the availability of damages in compensation for breaches of the Convention exclusively to violations of Article 5(5) ECHR and to acts performed in bad faith, the legal system of England and Wales nevertheless remains the most restrictive of the group.

The remaining members of group I resort to special provisions under domestic law so as to render the ECHR fully applicable in spite of the traditional rejection of the principle of State liability for judicial breaches under national law.⁵⁴⁵ In Ireland, for example, the full applicability of the ECHR is guaranteed under the European Convention on Human Rights Act 2003, which - contrary to the HRA 1998 - does not contain special derogations concerning acts of the judiciary.⁵⁴⁶ In this respect the situation is similar to that found in Greece, Bulgaria and the Netherlands.

The phenomenon we are facing in Greece and the Netherlands is a situation, which, in the course of our analysis, we will encounter in a number of countries in every group of our cartography. While the legislature in Greece is silent on the question whether the State is to be held liable for harmful acts of the judiciary, there is an established jurisprudence in the country, which has explicitly excluded judicial acts *stricto sensu* from the general applicability of Article 105 of the Introductory Law to

⁵⁴⁵ For an overview see graph on p. 168.

⁵⁴⁶ European Convention on Human Rights Act 2003 available at www.oireachtas.ie/documents/bills28/acts/2003/a2003.pdf.

the Greek Civil Code.⁵⁴⁷ As far as Greece's adherence to the ECHR is concerned, two noteworthy cases by the ECtHR concerning judicial violations of the Convention were the judgments in *Tsirlis and Kouloumpas v. Greece* of 29 May 1997 and in *Karakasis v. Greece* of 17 October 2000.⁵⁴⁸ Especially the former case is a vivid example of a clear violation of the Convention by a national court. The particular circumstances of the case revolved around two Jehovah Witnesses ministers who were both detained by military courts for their refusal to perform military service in Greece. In its judgment the ECtHR declared that the detention was arbitrary and violated Article 5 of the Convention. Moreover, the Court identified very clearly the perpetrator responsible for the violation by declaring that the military court had "blatantly ignored" ⁵⁴⁹ previous case-law on the religious exemption.

In the Netherlands the situation is rather similar. There is no explicit provision under Dutch law regulating the question whether the State is to be held liable for harmful acts of the judiciary.⁵⁵⁰ However, there is an established jurisprudence in the country, which has taken a clear stance on this issue.⁵⁵¹ The Dutch Supreme Court, *Hoge Raad der Nederlanden*, issued a fundamental ruling on this question in 1971,⁵⁵² in which it broadly rejected the principle of State liability for erroneous acts by the judiciary. However, like in other countries pertaining to group I in the Netherlands the

⁵⁴⁷ On the debate whether Article 105 of the Introductory Law to the Civil Code also embraces the judiciary see also DIMITRIS TH. TSATSOS, "Haftung des Staates für rechtswidriges Verhalten seiner Organe, Griechenland" in H. Mosler (ed.), *Haftung des Staates für rechtswidriges Verhalten seiner Organe: Länderberichte und Rechtsvergleichung; Internationales Kolloquium veranstaltet vom Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, 1964* (Köln, Carl Heymanns Verlag KG, 1967), pp. 223 *et seq.*

⁵⁴⁸ *Tsirlis et al.*, *supra* note 503 and *Karakasis*, *supra* note 503.

⁵⁴⁹ *Tsirlis et al.*, *supra* note 503, para. 59.

⁵⁵⁰ On the procedural consequences of the *Köbler*-doctrine under Dutch law see JAN H. JANS, "State liability and infringements attributable to national courts: a Dutch perspective on the *Köbler* case" in J. W. D. Zwaan and J. H. Jans (eds.), *The European Union an Ongoing Process of Integration* (The Hague, TMC Asser Press, 2004), pp. 174 *et seq.*

⁵⁵¹ We will be confronted with a similar situation, for example, in Slovenia (group II). For a general overview on the Dutch framework of liability see MATTHIAS HAENTJENS and EDGAR DU PERRON, "Liability for damage caused by others under Dutch law" in J. Spier (ed.), *Unification of Tort Law: Liability for damage caused by others* (The Hague/London/New York, Kluwer Law International, 2003), pp. 180-181.

⁵⁵² See *Hoge Raad*, 3 December 1971, *NJ* 1971, p. 137. See also CZAIA, *Die außervertragliche Haftung...*, *supra* note 16, p. 152.

State's liability for judicial violations was also introduced in exceptional and explicitly regulated cases. Accordingly, the *Hoge Raad* ruled that the State's liability could exceptionally be invoked for judicial violations which amounted to a breach of Article 6 of the ECHR and in fact, the Court has repeatedly confirmed this decision in subsequent rulings.⁵⁵³ This decision has been confirmed by many more recent ones, which accept liability of the State for judicial acts only when the judicial act constitutes an infringement of a fundamental principle, in a way that one cannot speak of a fair trial in the sense of Article 6 ECHR. Accordingly, the annotated judgment also related to a case where the rights of defence of the plaintiff had been infringed by the judgment for which the State was held liable.⁵⁵⁴ Furthermore, referring to the case-law of the *Hoge Raad* on the effects in criminal-law cases of judgments given by the European Court of Human Rights, the *College van Beroep voor het bedrijfsleven* (Administrative Court for Trade and Industry) recently underlined once again the importance attributed to Article 6 ECHR under Dutch law in the course of the proceedings in front of the CJEU in the case *Kühne & Heitz* by stating that

[t]he Hoge Raad der Nederlanden thus held, in a judgment of 1 February 1991 (Nederlandse Jurisprudentie - NJ - 1991, p. 413), that the subsequent discovery of an infringement of a fundamental right laid down in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is one determining factor which may preclude enforcement of a decision given in a criminal law case which cannot be the subject of an appeal.⁵⁵⁵

With reference to the two groups of exceptions which we can generally detect among the different countries in group I, a second set of cases in this respect are specific regulations concerning miscarriages of justice. The latter is a concept which tends to be defined in different ways under various national legal systems. In Greece,

⁵⁵³ In this context see also the decision of the *Hoge Raad*, 29 April 1994, *Nederlandse Jurisprudentie* 1995, p. 727. STORME, "The liability...", *supra* note 274, p. 657.

⁵⁵⁴ See also *Hoge Raad*, 17 March 1978, *NJ* 1979, p. 204.

⁵⁵⁵ Case C-453/00, *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren* [2004] ECR I-837, para. 16.

for example, Article 7(4) of the Greek Constitution contains the principled obligation of the State to compensate “persons unjustly or illegally convicted, detained pending trial, or otherwise deprived of their personal liberty”.⁵⁵⁶ More detailed provisions are then provided in Articles 533 to 542 of the Greek Code of Criminal Procedure.⁵⁵⁷ A compensatory scheme for miscarriages of justice also exists under the legal system of England and Wales, which - as previously mentioned - is outlined in section 133 of the Criminal Justice Act 1988.⁵⁵⁸ The situation in Bulgaria is rather similar. In addition to the general provision on State liability in Article 7 of the Bulgarian Constitution,⁵⁵⁹ Article 2(1) of the 'Act on the Liability of the State and Municipalities for Damages Inflicted on Citizens'⁵⁶⁰ provides an exhaustive list of cases in which the Bulgarian State can be held liable for erroneous acts committed by judicial authorities. Amongst others, this list includes cases of unjustified detention and false criminal conviction.

As discussed before, compensatory schemes for miscarriages of justice are widespread and common among the EU Member States.⁵⁶¹ Nevertheless, it remains doubtful whether it is indeed correct to label such compensatory mechanisms for miscarriages of justice as examples of State liability in tort. As we have already argued in chapter II, it is in fact an issue that stands at the sidelines of the generic

⁵⁵⁶ Article 7(4) of the Constitution of Greece: “The conditions under which the State, following a judicial decision, shall indemnify persons unjustly or illegally convicted, detained pending trial, or otherwise deprived of their personal liberty shall be provided by law.” With respect to the Greek system see also KONSTANTINOS D. KERAMEUS, “Liability for damage caused by others under Greek law” in J. Spier (ed.), *Unification of Tort Law: Liability for damage caused by others* (The Hague/London/New York, Kluwer Law International, 2003), pp. 133 *et seq.* For an explanation of the basic concepts of the Greek State liability regime consult TSATSOS, “Haftung...Griechenland,” *supra* note 547, pp. 187 *et seq.*

⁵⁵⁷ See also KERAMEUS, “Liability under Greek law,” *supra* note 556, pp. 133 *et seq.*

⁵⁵⁸ Available at www.opsi.gov.uk/ACTS/acts1988/ukpga_19880033_en_14.

⁵⁵⁹ Article 7 of the Bulgarian Constitution in its official translation: “The state shall be held liable for any damages caused by illegitimate rulings or acts on the part of its agencies and officials.” (Чл. 7. Държавата отговаря за вреди, причинени от незаконни актове или действия на нейни органи и длъжностни лица).

⁵⁶⁰ Закон за отговорността на държавата и общините за вреди.

⁵⁶¹ A study entitled “European Judicial Systems (2004-2006)” by the European Commission for the Efficiency of Justice of the Council of Europe has not long ago confirmed that an overwhelming majority of countries in Europe have implemented both, a system of compensation for wrongful arrest and for wrongful conviction. The report can be directly accessed at www.coe.int/t/dg1/legalcooperation/cepej/evaluation/default_en.asp.

debate on judicial accountability. Erroneous criminal sentences are generally considered to be neither a case of personal responsibility of judges nor one of State liability. Instead, these cases are usually instances of direct and strict liability of the State to provide the victim with an adequate indemnity, which has often been previously established by law and therefore does not grant full compensation for the damage suffered by the individual depending on the circumstances of each case.⁵⁶² As a consequence, with respect to the system established in the UK, compensation payments of this sort have been said to resemble more social welfare or *ex-gratia* payments rather than tort actions.⁵⁶³

d) Köbler in light of the ECHR: much ado about something?

The system established under the ECHR sheds an interesting light on the question of State liability for erroneous acts or omissions committed by the national judiciary. Whereas the introduction of the *Köbler* doctrine under EC law initially stirred noticeable controversy in the various EU Member States,⁵⁶⁴ the same concept as applied under the ECHR did not provoke comparable reactions in these countries. An individual who is the victim of a violation of the Convention by a public authority of one of the Contracting States has a right to an effective remedy before a national authority. This principle applies irrespective of which branch of the State was responsible for the damage. Under the Convention system the State is therefore not only liable for legislative and administrative breaches of the ECHR, but also for violations of the Convention committed by the national judiciary.

In view of the smooth application of this principle under the ECHR, the question arises whether the negative hype among the Community's Member States

⁵⁶² Critical with respect to the UK system JOHN BELL, "The Law of England and Wales" in J. Bell and A. W. Bradley (eds.), *Governmental Liability: A Comparative Study* (London, The United Kingdom National Committee of Comparative Law, 1991), pp. 42 *et seq.* and FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, pp. 252 *et seq.*

⁵⁶³ In this sense also BELL, "England and Wales...", *supra* note 562, p. 42 and FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, pp. 252 *et seq.*

⁵⁶⁴ See for example WATTEL, "Köbler, Cilfit and Welthgrove...", *supra* note 152, pp. 177-190 and GEORG WILHELM, "Staatshaftung für judikatives Unrecht oder Saturnalien des Schadenersatzes" (2003) *Ecolex*, p. 733.

after *Köbler* in certain EU Member States was justified or at least comprehensible. Not least due to the CJEU's repeated reference to the ECHR in its *Francovich* case-law, there are undoubtedly a number of parallels between the application of the *Köbler* doctrine under EC law and the State's responsibility for judicial breaches in the context of the ECHR. By analogy these similarities, which we will highlight in the following section, could in fact facilitate the application of the *Köbler* principle under domestic law in England and Wales. Nevertheless, as we will uncover afterwards, the implications and basic differences between the system of State liability for judicial breaches of EC law and the State's responsibility for judicial violations of the ECHR weigh so heavily as to justify a clear differentiation in the application of the two concepts under national law.

In accordance with classical international law, the Convention system adheres to a unitary concept of the State.⁵⁶⁵ The European Court of Human Rights has referred to this principle on several occasions in its jurisprudence and declared that “[t]he Court does not have to specify which national authority is responsible for any breach of the Convention: the sole issue is the State’s international responsibility.”⁵⁶⁶ In other words, this concept implies that public liability can be imposed irrespective of which organ of the State is responsible for the breach. Accordingly, the principle of State liability for erroneous judicial decisions has always been an integral part of the Convention system. In a similar manner, the Court of Justice already declared in the joint cases of *Brasserie du Pêcheur & Factortame* that

in international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply a fortiori in the Community legal order since all State authorities [...] are bound in

⁵⁶⁵ SCOTT, "State Liability...", *supra* note 364, p. 406.

⁵⁶⁶ *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, para. 46. See also *Foti and Others v. Italy*, judgment of 10 December 1982, Series A no. 56; *Zimmermann et al.*, *supra* note 503; *Baggetta v. Italy*, judgment of 25 June 1987, Series A no. 119 *et al.*

performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.⁵⁶⁷

The Court later explicitly re-confirmed the application of this principle in the *Köbler* case.⁵⁶⁸

A further correlation between the two systems emerged from the rule of prior exhaustion of domestic remedies, which is a fundamental part of the Strasbourg court's admissibility criteria.⁵⁶⁹ The requirement of prior exhaustion of all domestic remedies implies that any judicial decision at issue before of the ECtHR usually has to be that of a court of last instance, which will naturally be endowed with the authority of *res judicata*. Thereby, the system of the ECHR has once more served as a model for the CJEU in the context of its deliberations in the *Köbler* case. In its reasoning on the question of State liability for judicial breaches, the CJEU explicitly referred to the jurisprudence of the European Court of Human Rights by stating that "[t]he case-law of that court shows that such a reparation may also be granted when the infringement stems from a decision of a national court adjudicating at last instance".⁵⁷⁰ This argument has a great deal of merit and we will return to it at a later stage when discussing the question of whether the principle of *res judicata* generally constitutes a justified barrier to liability claims under EC law.⁵⁷¹

Moreover, the discussion surrounding the "Euro-tort" and the precise nature of the domestic claim in the UK re-emerged in an almost identical manner with the enactment of the HRA 1998 in England and Wales.⁵⁷² As the European Convention on Human Rights is first and foremost to be applied under domestic law, there has

⁵⁶⁷ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 34.

⁵⁶⁸ C-224/01, *Köbler*, *supra* note 1, para. 32.

⁵⁶⁹ Article 35(1) ECHR concerning admissibility criteria states that: "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

⁵⁷⁰ C-224/01, *Köbler*, *supra* note 1, para. 49.

⁵⁷¹ See chapter VI, pp. 385 *et seq.*

⁵⁷² On the nature of the "Euro-tort" see pp. 121 *et seq.*

also been a vigorous debate on the nature of the cause of action based on the Human Rights Act under national law in the UK. Some have argued that the HRA creates a new form of action for breach of statutory duty,⁵⁷³ or that it is to be classified as “a new public law tort of acting in breach of the victim’s Convention rights”.⁵⁷⁴ Others have entirely rejected the idea that this remedy is a new government tort.⁵⁷⁵ As mentioned before, there is no automatic right to damages for unlawfulness under English law and the courts retain full discretion as to the remedy they grant. Furthermore, it is inaccurate to describe this action under the HRA as a public law tort if there is no right to monetary compensation. In this respect, it may perhaps be more apt to classify the action as a new legal instrument to award damages for unlawfulness.⁵⁷⁶ Similar to the method applied in the UK for the Euro-tort, the framework used with respect to HRA-related claims is also not to subsume the action under one of the existing heads of tort.⁵⁷⁷

Despite these correlations and in spite of the fact that in both cases, the *Köbler* doctrine as well as the rights enshrined in the European Convention on Human Rights, we are faced with exceptions to the general principle of Crown immunity for judicial breaches in the UK, the two concepts nevertheless differ substantially. The most fundamental difference to the *Köbler* principle under EC law is first and foremost that an individual, whose rights and freedoms recognized in the ECHR have been violated by a judicial act, is merely entitled to an effective remedy before a national authority in the respective Contracting State.⁵⁷⁸ The Contracting States have a wide discretion in this respect. The only obligation is to provide a remedy which is

⁵⁷³ See report by the Law Commission on *Damages under the Human Rights Act 1998*, *supra* note 476, para. 4.20 (although this analogy is qualified with the reservation that “the remedy is discretionary, rather than as of right”).

⁵⁷⁴ D. PANNICK and A. LESTER, “The Impact of the Human Rights Act on Private Law: the Knight’s Move” (2000) 116 *L.Q.R.* 380, p. 382.

⁵⁷⁵ LORD WOOLF, “The Human Rights Act 1998 and Remedies” in M. Andenas and D. Fairgrieve (eds.), *Judicial Review in International Perspective, Liber Amicorum in Honour of Lord Slynn of Hadley, Volume II* (The Hague/Boston, Kluwer Law International, 2000), p. 432. See also FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, p. 54.

⁵⁷⁶ DUNCAN FAIRGRIEVE, “The Human Rights Act 1998, Damages and Tort Law” (2001) *Public Law* (Win), p. 696.

⁵⁷⁷ DEAKIN *et al.*, *Tort Law*, *supra* note 339, p. 440.

⁵⁷⁸ Cf. Article 13 ECHR.

effective (*'effectif'* or *'utile'* in the French texts). Subject to this reservation they are free to map out a remedy, which may – according to the case – result in the physical termination of the act constituting the violation, its cancellation, its withdrawal, its alteration or non-application, civil damages, criminal or disciplinary sanctions and others.⁵⁷⁹

According to the *Francovich* doctrine, on the other hand, “it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.”⁵⁸⁰ In other words, under Community law defaulting Member States are obliged to grant full compensation to the harmed individual for the damage sustained. Whereas monetary compensation is therefore indispensable under EC law in this context, it is within any court's discretion to award damages in case of a violation of the ECHR.⁵⁸¹

Apart from this fundamental difference, what renders the *problématique* under Community law even more complex is the procedural dimension of the claim. With respect to the ECHR final decisions concerning judicial violations of the Convention are taken by the European Court of Human Rights, a court established outside any domestic legal framework. On the contrary Community law adheres to the principle of national procedural autonomy, which implies that from a procedural point of view a judicial violation of EC law might cause a direct conflict under domestic law between the court, which ruled in the initial case and whose decision consequently gave rise to the liability claim on the one hand, and the court, which finally has to decide upon the State's liability on the other. In sum, it appears that the Community

⁵⁷⁹ Accordingly, Article 8(1) of the HRA 1998 declares that the court “may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate”.

⁵⁸⁰ C-6 & 9/90, *Francovich*, *supra* note 2, para. 37.

⁵⁸¹ We do, however, acknowledge that compensation might not always be the best remedy available. In this respect, the ECHR often demands that States go further than just providing monetary compensation to the victim. This is the case, for example, in torture cases, in which those responsible must be prosecuted. Furthermore, there is a growing trend in Strasbourg to order individual measures such as *restitutio in integrum* or retrials under Articles 41 and 46 of the Convention.

law principle enshrined in *Köbler* faces an even greater number of substantial impediments and procedural obstacles in its application under national law.⁵⁸²

4. Applying the inapplicable?⁵⁸³ Crown liability for judicial breaches of Community law

a) Theoretical basis and preliminary considerations

Köbler v. Republic of Austria confirmed what had already been previously established in the CJEU's judgment in *Brasserie du Pêcheur* and *Factortame*,⁵⁸⁴ namely that the unitary concept of the State, as it persists under international law also fully applies for the purposes of Community law. Accordingly, the CJEU stated that

[i]t is for each Member State to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with Community law, *whichever public authority is responsible for the breach* and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation.⁵⁸⁵

Thus, as explicitly stated in *Köbler*, the State can be held liable under Community law to pay compensation for damages caused to the injured party on the basis of a judicial act violating Community law rights.

However, does this principle also apply in a country where absolute Crown (State) immunity for judicial acts is guaranteed by statute?⁵⁸⁶ And if so, according to which framework would such a Community right be implemented under the domestic remedial scheme in the UK? As the reader might recall, we have already briefly touched upon this question earlier on in the context of the CJEU's *Factortame*

⁵⁸² In this context see also WATTEL, "Köbler, Cilfit and Welthgrove...", *supra* note 152, p. 187.

⁵⁸³ In the style of TONER, "Thinking the Unthinkable...", *supra* note 100, pp. 165 *et seq.*

⁵⁸⁴ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 32.

⁵⁸⁵ C-302/97, *Konle*, *supra* note 7, para. 62 (emphasis added); see also C-46 & 48/93, *Brasserie*, *supra* note 4, para. 32.

⁵⁸⁶ Section 2(5) CPA 1947.

ruling.⁵⁸⁷ Hence we also acknowledged the fact that under national law breaches of law by the national legislature and the judiciary were excluded from liability claims against the Crown. Nevertheless, as we have demonstrated, Community law already 'transplanted' the - until then unknown - principle of Crown liability for legislative breaches into the UK domestic legal framework, even though similar claims without Community-law relevance are not admissible under national law to this day. Even if it led to the development of a twin-track system in the UK divided between cases of State liability with or without a Community-law component, an autonomous cause of action, the Euro-tort, emerged as a result under national law.⁵⁸⁸

As for the judiciary, the situation is even more precarious. Not only has Crown liability for judicial violations been explicitly ruled out by statute, but the judiciary as such enjoys a special status within the British system of government. According to the principle of national procedural autonomy this begs the question in which way the right to a remedy as guaranteed in the *Köbler* ruling could be grafted onto domestic law in order to secure the individual's right? Which national court would be competent to rule in such a case? And which court would be competent to decide in case of a liability claim for a violation of Community law committed by the House of Lords? Moreover, to what extent could the *Köbler* principle in the future have an influence on the domestic rule of absolute judicial immunity as regulated in section 2(5) of the Crown Proceedings Act?

Pending the CJEU's final decision in the *Köbler* case, the United Kingdom government - in line with the reasoning of the Austrian and the French governments - already raised serious doubts with respect to the practical application of the *Köbler* principle.⁵⁸⁹ The UK called into question the very essence of this principle and brought forward an array of arguments against its application, referring to the principles of legal certainty and finality of litigation, as well as the maxim of *res judicata*, which would, according to the UK government's submission in the *Köbler*

⁵⁸⁷ See pp. 118 *et seq.*

⁵⁸⁸ See pp. 125 *et seq.*

⁵⁸⁹ See also ZUCKERMAN, "Appeal to the High...", *supra* note 472, pp. 9-10.

case, altogether be weakened by such actions. Moreover, in the eyes of the UK government an extended *Francovich*-doctrine would undermine the authority and the reputation of the judiciary and endanger the independence of the judicial branch, which was a principle that could not be compromised.⁵⁹⁰

The UK also reminded us of the fact that under the legal system of England and Wales – apart from judicial violations of Article 5 ECHR - no action could be brought against the Crown based on a harmful judicial act. As regards the application of the *Francovich* doctrine to judicial breaches of Community law the government summed up its position by stating that compared to the powerful concerns mentioned above “[t]he advantage to be gained from acknowledging that damages may be obtained in respect of judicial decisions is therefore correspondingly small.”⁵⁹¹

The government's submission also underlined the fact that a *Köbler*-type claim would raise serious procedural difficulties in the UK. In fact, due to the country's unitary court system and the strict doctrine of *stare decisis*, it would be difficult to find a national court competent to rule in such cases.⁵⁹² In addition to that, the UK added that the law generally discouraged re-litigation of judicial decisions, save by means of appeal. Hence, in an attempt to protect the interests of the parties involved and in order to underline the principle of legal certainty, the UK government concluded that an “[a]cknowledgment of State liability for a mistake by the judiciary would throw the law into confusion and would leave the litigating parties perpetually uncertain as to where they stood.”⁵⁹³

⁵⁹⁰ C-224/01, *Köbler*, *supra* note 1, para. 26. With this argument the UK overtly hinted at the alleged tension existing between the two principles of judicial accountability and judicial independence, as well as the conflicting values encapsulated in both of them. We have already discussed these issues and also the related principle of judicial immunity in chapter II.

⁵⁹¹ *Ibid*, para. 24.

⁵⁹² *Ibid*, paras. 24-28. ZUCKERMAN, "Appeal to the High...", *supra* note 472, p. 10.

⁵⁹³ C-224/01, *Köbler*, *supra* note 1, para. 25.

b) Structural deficiencies: *quis iudicabit?*

The argument raised by the United Kingdom concerning the procedural entanglements generated by the application of the *Köbler* doctrine under national law is in fact a concern which is frequently raised in the literature not only with reference to the UK's judicial structure, but also with respect to other EU Member States.⁵⁹⁴ In addition to the substantive impediment of absolute judicial immunity, it is essentially the unitary court system in the UK and the strict doctrine of *stare decisis* that render it difficult to determine the court competent to adjudicate on a liability claim against the State for an alleged judicial breach of EC law.⁵⁹⁵ In theory, with the application of the *Köbler* principle in the UK any individual, who is not satisfied with the final decision in his or her case could start a new action against the UK Government by claiming compensation for a harmful judgment by the court of final instance, which was supposedly in breach of EC law. This new action could however not be lodged in front of the House of Lords as the highest court in the UK, simply because the latter has no jurisdiction to rule as a court of first instance. Assuming that the harmed individual lodges the liability claim in the High Court instead, this Court would then have the duty to decide in the course of the liability proceedings whether the State had to compensate the claimant for his/her loss. In application of the *Köbler* criteria, the High Court would therefore be compelled to interpret and 'evaluate' the earlier judgment of the House of Lords, which gave rise to the liability claim in the first place. In other words, in the course of the proceedings the High Court would face the delicate task of having to rule on the question whether the Lords' judgment did in fact amount to a breach of Community law manifest enough to warrant damages. Such an assessment is undoubtedly tantamount to an indirect revision of the House of Lords' final ruling. In sum, this would create the confusing situation whereby a court at the

⁵⁹⁴ See, for example, WILHELM, "Staatshaftung...", *supra* note 564, p. 733; GEORGIOS ANAGNOSTARAS, "Erroneous Judgments and the Prospect of Damages: The Scope of the Principle of Governmental Liability for Judicial Breaches" (2006) 31 *ELR* 5, p. 736; CLASSEN, "Case C-224/01...", *supra* note 102, p. 818; AMANDINE GARDE, "Member States' Liability for Judicial Acts or Omissions: Much Ado About Nothing?" (2004) 63 *Cambridge Law Journal* 3, pp. 565 *et seq.*; ZUCKERMAN, "Appeal to the High...", *supra* note 472, p. 11, *et al.*

⁵⁹⁵ C-224/01, *Köbler*, *supra* note 1, para. 28.

bottom of the judicial hierarchy re-assesses a judgment previously pronounced by the highest court in the country.⁵⁹⁶

Subsequently, if the High Court thought that there was any doubt as to the correctness of the Lords' ruling, there is a reasonable likelihood that it would react in the same way as the Civil Court of Vienna in the *Köbler* case and refer the question for a preliminary ruling to the CJEU on the basis of Article 234 EC.⁵⁹⁷ As the UK government rightly stated it would first and foremost be questionable in view of the requirement of impartiality to have proceedings on the responsibility of a State for acts or omissions of its judicial organs heard by the national courts of that State, unless those courts were to make preliminary references to the CJEU.⁵⁹⁸ Therefore, also in the interest of impartiality the domestic court would search for a way to alleviate the burden of having to challenge indirectly the presumption that the Lords' judgment was correct by involving the CJEU in the case.

In response to such a reference, the CJEU would be able to rule on the content and the interpretation of European law.⁵⁹⁹ The preliminary rulings procedure under Article 267 TFEU outlines a clear division of competences between the national courts and the CJEU and hence establishes a framework for close cooperation between the national courts and the CJEU, which is based on the assignment of different functions. This has been confirmed even in the case-law of the Court itself.⁶⁰⁰ Should the CJEU therefore stay within the limits of its mandate under Article 234 EC, then it would eventually be up to the national court of first instance to decide on the severity or, more precisely, the 'manifestness' of the Lords' breach. Where the High Court's decision subsequently progresses up the national appellate structure, it would eventually end up in front of the House of Lords, which is however the judicial

⁵⁹⁶ ZUCKERMAN, "Appeal to the High...", *supra* note 472, pp. 11 *et seq.* On this point see also SCOTT, "State Liability...", *supra* note 364, p. 405. In a more general context, see TRIDIMAS, "State Liability...", *supra* note 91, p. 154.

⁵⁹⁷ On this point see also ZUCKERMAN, "Appeal to the High...", *supra* note 472, pp. 11 *et seq.*

⁵⁹⁸ C-224/01, *Köbler*, *supra* note 1, paras. 24-28. See also TONER, "Thinking the Unthinkable...", *supra* note 100, p. 174.

⁵⁹⁹ Article 267 TFEU.

⁶⁰⁰ Case 6/64, *Costa v. ENEL*, *supra* note 396, paras. 1 *et seq.*

organ responsible for the breach in the first place.⁶⁰¹ This would mean that a group of Law Lords was to rule on an earlier judgment previously taken by their colleagues.

A second possibility would be that the CJEU might, as it did in the *Köbler* case, go as far in the course of the preliminary rulings procedure as to express an opinion on whether the *Francovich* conditions for liability were satisfied in the specific case.⁶⁰² Thereby, the CJEU would automatically rule on the question whether the breach of Community law by the national court was manifest enough to invoke the liability of the State. However, in this case the danger would be that the CJEU's involvement via the preliminary rulings procedure in *Köbler*-type cases under national law would work to the detriment of the delicate balance in the relations between the EU's Court of Justice and the national courts of last instance. In the absence of an EU-wide common appellate structure, the relationship between the national courts of last instance and the CJEU is traditionally based on cooperation rather than hierarchy. In light of the creation of such a quasi-appeal to the CJEU by national courts of first instance when faced with a *Köbler*-like claim, this cooperative relationship could suffer as it clearly undermines the position of national courts of last instance.⁶⁰³

In sum, precisely such a scenario would raise a number of problems for the domestic legal system in the UK. First, as claimed by the UK government in *Köbler*, it reduces legal certainty by allowing litigants a second chance to raise the legal question, which should have been resolved in the primary action. After all, for individuals this would open up a possibility of 'appealing' to the CJEU against the national courts' interpretation of EC law. Secondly, there are legitimate concerns that the application of the *Köbler* principle would disturb the domestic legal hierarchy in the UK.⁶⁰⁴

⁶⁰¹ ZUCKERMAN, "Appeal to the High...", *supra* note 472, p. 12. See also SCOTT, "State Liability...", *supra* note 364, pp. 404-405.

⁶⁰² See C-224/01, *Köbler*, *supra* note 1, paras. 100 *et seq.*

⁶⁰³ *Ibid.*, para. 27. See also, Opinion of Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 21.

⁶⁰⁴ So also SCOTT, "State Liability...", *supra* note 364, p. 404.

c) Post-Köbler developments?

While all the different objections voiced in the submission by the UK government and others in the *Köbler* case certainly weigh heavily, there are nevertheless a number of facts that also need to be taken into serious consideration. As highlighted before, the European Communities Act of 1972⁶⁰⁵ provided for the incorporation of Community law into the strictly dualistic legal framework in Britain. Through an Act of Parliament, the ECA 1972 established that Community law should prevail over domestic law in case of conflict, including “any enactment passed or to be passed.”⁶⁰⁶ By this fact, even then parts of the sovereign powers of the British Parliament were transferred to the Community level. This means that on the basis of the principle of subsidiarity specific provisions of national law, such as section 2(5) of the CPA, would have to be set aside for example for the overriding Community law principle of an individual’s right to receive compensation from the State in case of a violation of his or her Community rights. Ever since the judgment in *Brasserie du Pêcheur/Factorame*, but surely since *Köbler*, this would be the case whenever the conflicting doctrine of judicial immunity in the UK would render the award of such compensation impossible and therefore operate to deny the individual rights and remedies guaranteed under European Community law.⁶⁰⁷

Thereby it is important to remember that similar to cases of legislative breaches of EC law, a domestic remedial avenue to be pursued by an individual in case of judicial breaches of domestic law does not exist under British law. Similar to the solution applied in *Factortame*,⁶⁰⁸ the cause of action with respect to *Köbler*-type claims could therefore also be classified as a tort-like action *sui generis* or ‘Euro-tort’, which would again be based on the fundamental conditions set up by the CJEU in the *Francovich* line. This way, the most likely outcome would be the confirmation of the prevailing “dual-track approach” in the UK. In other words, the application of the

⁶⁰⁵ Hereafter also referred to as “ECA 1972”.

⁶⁰⁶ Section 2(4) ECA 1972.

⁶⁰⁷ TONER, “Thinking the Unthinkable...,” *supra* note 100, p. 180.

⁶⁰⁸ See analysis on pp. 118.

‘Euro-tort’ – a holding that applies only to cases, which have a Community law component – will leave untouched the principle of absolute judicial immunity under English law. The individual would then once again be forced to pursue a different procedural path under domestic law depending on whether there is a Community law component involved in the specific case or not. Each track will then lead to different results and a different degree of protection.

So far the gradual expansion in the application of the Euro-tort by British courts has always been the result of decisions taken by the CJEU.⁶⁰⁹ The ongoing development of the *Francovich* principle, as aptly demonstrated in *Köbler*, inevitably poses renewed challenges for the UK courts. Even though a host of questions still remain unanswered in this context, the existence of the Euro-tort for judicial breaches of Community law is, at the latest since the *Köbler* ruling, an undeniable fact. One who has undoubtedly understood the relentlessness of this development is Lord Bingham, who in his dissenting opinion in the case *D v. East Berkshire Community Health NHS Trust* recently commented on the changes facing English tort law. Even though in this particular case he spoke with reference to the ECHR, the message which emerges from it is simple and can easily be conveyed to Community law:

[T]he question does arise whether the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems or whether it should remain essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention. I prefer evolution.⁶¹⁰

Based on the concluding words of Lord Bingham, the UK will also eventually have to endorse the changing reality of Community law.

⁶⁰⁹ As in C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 1 *et seq.* and C-6 & 9/90, *Francovich*, *supra* note 2, paras. 1 *et seq.*

⁶¹⁰ *D. v. East Berkshire Community Health NHS Trust and others; MAK and another v. Dewsbury Healthcare NHS Trust and another; RK and another v. Oldham NHS Trust and another* [2005] 2 AC 373, 400, para. 50.

III. Graphic Overview of GROUP I

State liability for judicial breaches only in truly exceptional cases of...		ENGLAND	IRELAND ⁶¹¹	NETHER- LANDS ⁶¹²	BULGARIA	GREECE ⁶¹³	MALTA*
ECHR	...a violation of the ECHR <i>in iudicando</i> and <i>in procedendo</i>		✓ ⁶¹⁴		✓	✓	✓ ⁶¹⁵
	...a violation of Art. 5(5) ECHR – Deprivation of liberty	✓ ⁶¹⁶					
	...a violation of Art. 6 ECHR	? ⁶¹⁷		✓ ⁶¹⁸			
Miscarriage of Justice (Wrong conviction under criminal law)		✓ ⁶¹⁹	✓ ⁶²⁰	✓	✓	✓	n.a.**
Unjustified detention on remand (under domestic law)		✓ ⁶²¹	✓	✓	✓	✓ ⁶²²	n.a.

* with reservations

** not available

⁶¹¹ For more details with respect to the Irish system see pp. 112 *et seq.*

⁶¹² See pp. 151 *et seq.*

⁶¹³ For comments on the Greek system of State liability see pp. 151 *et seq.*

⁶¹⁴ Based on the European Convention on Human Rights Act 2003.

⁶¹⁵ The situation under Maltese law is not entirely clear. While the legislature is silent on the question of whether the State can be rendered liable for erroneous judicial acts, the doctrine seems to support the invocation of State liability in cases of judicial violations of Articles 32 to 45 of the Maltese Constitution. These provisions essentially concern fundamental human rights violations.

⁶¹⁶ Based on section 9(1) Human Rights Act 1998.

⁶¹⁷ The issue is not fully resolved. There is no explicit provision under UK law recognizing the concept of Crown liability for judicial breaches under Article 6 ECHR, nor does the HRA 1998 contain any special exemption in reference to Article 6 ECHR. Even though the ECtHR has repeatedly condemned the UK for breach of Article 6 ECHR incurred by the judicial branch, it seems that domestically such violations are subsumed under the heading of "miscarriage of justice" as regulated in the Criminal Injuries Compensation Scheme in the Criminal Justice Act 1988.

⁶¹⁸ See *Hoge Raad*, 3 December 1971, *NJ* 1971, 137 and *HR*, 17 March 1978, *NJ* 1979, 204.

⁶¹⁹ The Criminal Injuries Compensation Scheme in the Criminal Justice Act 1988.

⁶²⁰ Section 9 Criminal Procedure Act 1993.

⁶²¹ For tort of false imprisonment see decision of the House of Lords in *R. v. Governor of HM Brockhill Prison, ex parte Evans* (no. 2) [2001] 2 AC 19.

⁶²² See Article 7(4) of the Greek Constitution in combination with Articles 533 to 545 of the Criminal Procedural Code concerning the responsibility of the State for false convictions and unjustified detention on remand.

CHAPTER IV.
**RESTRICTED SCOPE OF STATE LIABILITY FOR JUDICIAL
BREACHES ACCORDING TO THE SOURCE AND/OR THE NATURE
OF THE JUDICIAL ACT CAUSING THE BREACH
(GROUP II)**

The focus of this chapter is a discussion of those national systems which fall under the second group of our classificatory scheme. The distinctive feature which characterises the Member States of this group is that in each case we find State liability regimes which restrict the scope of liability for damage caused by the judiciary according to either the *source* or the *nature of the judicial act*. The noteworthy differences to group I, which has been discussed in the previous chapter, are therefore twofold. First, instead of a total preclusion of State liability for judicial breaches as it is the case for countries falling under group I,⁶²³ we are now faced with national systems which in principle recognize the basic concept of State liability for harm caused by judicial authorities. However, and this is the second distinctive feature separating group I from group II, the restrictions imposed on the scope of liability in group II always concern the source⁶²⁴ and/or the nature of the judicial act itself.

As the reader will recall, the Member States in the first group of our cartography feature rare and selective exceptions in national systems, which traditionally reject any form of State liability for judicial breaches. It is yet another significant feature of group I that these limited exceptions allowing for the State's liability for judicial violations usually depend on the distinct *nature* and/or the *source of the legal rule infringed*. This is the case, for instance, if the judiciary acts in breach of a specific

⁶²³ The very limited number of exceptions to this rule generally rest on a separate normative basis. In England and Wales, for example, such an exception is defined under s. 9(1) HRA 1998. See chapter III, pp. 138 *et seq.*

⁶²⁴ When talking about the 'source of a judicial act' we are referring to an act taken by a particular court.

international treaty or convention, to which the respective country is a signatory.⁶²⁵ In other words, for the exceptions we encounter in group I, the emphasis lies on the source and/or the nature of the legal rule violated by the judicial act. In group II of our analysis, on the other hand, we are now dealing with countries basing the limitations to their general framework of State liability for judicial breaches purely on the source and/or the nature of the judicial act, which is responsible for the violation in each particular case. In sum, if we were concerned with the nature and/or the source of the legal rule infringed before, we should now focus on the nature and/or the source of the actual harmful act performed by the judicial organ(s).

The method of restricting the ambit of State liability *qua* the source and/or the nature of the judicial act appears to be a popular solution among different EU Member States. Countries pertaining to this particular group are, *inter alia*, Sweden,⁶²⁶ Romania, Italy,⁶²⁷ Slovenia, Austria and Germany.⁶²⁸ All of these countries impose restrictions on the invocation of State liability for judicial breaches either with respect to acts performed by specific courts or court organs (*source*) and/or with respect to specific predefined acts performed by any court or court organ within the national judicial hierarchy (*nature*). Apart from this distinction between the source and the nature of a judicial act, there is also another pertinent feature that allows us to split the countries belonging to this second group into an additional subgroup. However, it should be underlined at this point that there is no clear line separating the two subgroups from each other and that countries can also qualify for both of them. In other words, instead of being exclusive, the two subgroups overlap. Apart from the main differentiation between the source and the nature of the judicial act, the restrictions concerning the State's liability for judicial breaches within group II can

⁶²⁵ The most prominent examples in this respect are judicial violations of the European Convention on Human Rights (source of the legal rule infringed), which are subject to specific rules in all the countries included in group I. See chapter III, pp. 138 *et seq.*

⁶²⁶ Apart from belonging to group II Sweden also classifies for group III of our classification scheme. For details on the third group, see chapter V of the thesis, pp. 229 *et seq.*

⁶²⁷ Like in the case of Sweden also with respect to Italy we are faced with an exceptional situation in that the Italian framework of State liability qualifies for both group II and group III.

⁶²⁸ See cartography with the specific table devoted to the classification of group II at the end of this chapter.

either be of a positive or a negative nature. The latter implies that group II can be subdivided between those countries whose restrictions of the State's liability for acts performed by the judiciary are of an exclusive (or positive) character, and those countries featuring restrictions of an inclusive (or negative) nature.⁶²⁹ Systems containing limitations of an exclusive character in theory recognize the principle of State liability for judicial breaches and only exclude a specific predefined group of cases from its application. As a result, these national systems tend to be much more receptive and positively inclined towards the concept of State liability for judicial breaches in general. The countries which feature restrictions of an inclusive character, however, start from the basic premise that there is no general principle of State liability for judicial breaches. Based on this negative assumption, they strictly limit the application of such form of liability to an exceptional and narrowly defined number of acts.

While the additional distinction between exclusive and inclusive systems only takes place within the second group of our cartography, it is nevertheless an interesting feature, which allows us to categorize the different national systems even beyond the four core groups which we have identified already. Given the variety of different features included in group II, our aim in this chapter will be to demonstrate the widest possible spectrum of all the countries included in this group. Therefore, we will first discuss the case of a Member State featuring a general exclusion of State liability for breaches committed by specific courts (*source*) on the one hand, only to then move on to a country foreclosing certain acts (*nature*) entirely from its State liability regime on the other.⁶³⁰ In the latter case, the example chosen will be Italy, where we also have the unique opportunity of following the CJEU's own analysis on the compatibility of the domestic liability regime with the *Köbler* principle in the case *Traghetti del Mediterraneo Spa*.⁶³¹

⁶²⁹ This differentiation is not based on an official scheme or formula, but it is a method of classification which has been set up by the author.

⁶³⁰ For a general overview of all the countries pertaining to group II and their division into various subgroups, see graph on p. 227.

⁶³¹ C-173/03, *Traghetti*, *supra* note 134, paras. 1 *et seq.*

For the former, the Austrian system of State liability and its restrictions in terms of attribution represent the prime example or the prototype for all the Member States classified under the heading of group II. In light of the *Köbler* case the choice of Austria was an obvious one for two reasons. First, there is the advantage of examining what procedural and/or substantive adjustments were required in Austria to implement the *Köbler* ruling. Second, as noted earlier, the Austrian case is a vivid example of a public liability regime that restricts the State's liability for harmful acts committed by the judiciary according to the source of the damaging act. In other words, in Austria the invocation of State liability for harmful judicial acts has been limited depending on which court was ruling in the particular case.

Overall, the Austrian system of regulation is of a positive nature in the sense that the general recognition of the concept of State liability for judicial breaches is merely restricted with respect to the national supreme courts. In fact, in Austria the three superior courts enjoy absolute immunity from suit for all their acts. Similarly, an almost identical concept of such limited application has been implemented in Sweden, where the State's liability for harmful acts committed by judicial organs is also entirely excluded whenever the violation stems from one of the Swedish supreme courts.⁶³² In the case of Austria and Sweden, we are therefore faced with what has previously been called restrictions of an exclusive character. Both of these systems differentiate on the basis of the source of the respective act and consequently, based on this criterion then only exclude acts of certain courts from the generally applicable State liability regime for judicial breaches.

While one part of the Member States in group II base the restrictions to their State liability regimes on the source of the harmful judicial act, a similar form of limitation has been set up in other countries which also belong to the second group of our classification scheme. As mentioned before, this second set of countries contained in group II applies a slightly different method of restricting the public liability framework for erroneous judicial acts. Contrary to the first sub-group, where we were

⁶³² The specific courts concerned in this context are the Swedish Supreme Court (*Högsta domstolen*) and the Supreme Administrative Court (*Regeringsrätten*).

concerned with the *source* of the allegedly harmful act, the restrictions applied in this second sub-group are based on the *nature* of the judicial act causing the damage. The method of using the nature of a judicial act as the decisive criterion for or against the State's liability for damages caused by the judiciary is a concept applied, *inter alia*, under Italian, Romanian, German and Slovenian law. The limitations to the general State liability regime for judicial violations in these countries are therefore not targeted at the question of which particular court carried out the harmful act, but rather at which *type* of act had been performed by the national judicial officer(s) causing the damage. By using the notion of 'type' in this context we are once again referring to the specific nature of an act, which can be determined according to the explicit characteristics attached to it.

In Germany, for example, State liability for judicial breaches is restricted to acts which constitute a crime according to the German Criminal Code.⁶³³ Thus, it is important to underline that the restrictions to the German State liability regime only apply to judicial acts *stricto sensu*. In cases when a judicial organ performs ministerial acts or administrative tasks, State liability can be fully invoked under the general provisions of Article 839(1) *BGB*.⁶³⁴ In Italy, on the other hand, we encounter a system that excludes entirely the State's liability for any judicial act involving legal interpretation and the evaluation of facts and evidence.⁶³⁵ As we can deduce from these examples, the second sub-category of group II not only includes national systems featuring so-called restrictions of an exclusive nature, but also contains countries whose limitations to the State's liability for judicial breaches are of an inclusive character. The latter, like Germany, recognise the liability of the State for judicial breaches only in cases when the harmful judicial act possesses additional characteristics which qualify it in terms of its nature. Starting from the premise that judicial violations generally do not invoke liability, the German system, as mentioned

⁶³³ See Article 839(2) para. 1 of the German *BGB*: "*Verletzt ein Beamter bei dem Urteil in einer Rechtssache seine Amtspflicht, so ist er für den daraus entstehenden Schaden nur dann verantwortlich, wenn die Pflichtverletzung in einer Straftat besteht.*"

⁶³⁴ See, *inter alia*, CZAJA, *Die außervertragliche Haftung...*, *supra* note 16, pp. 142-143.

⁶³⁵ This aspect of the Italian State liability regime gave rise to the famous follow-up ruling by the CJEU to the *Köbler* case, C-173/03, *Traghetti*, *supra* note 134, paras. 1 *et seq.*

before, only allows for the State's liability whenever the judicial act constitutes a crime according to the German Criminal Code.⁶³⁶

In sum, group II of our cartography comprises a large and also rather diverse set of countries. For the reasons outlined above and in order to cover the widest possible spectrum, the focus of the following section will first be on the legal situation in Austria, which is a country that also belongs to the first sub-category of group II as it features restrictions of a purely exclusive nature. In the course of our discussion of Austria's legal framework with respect to State liability claims for judicial breaches, we will also briefly address the corresponding regime in Sweden. In the second part of this chapter we will then look at the Italian regime of State liability in light of the CJEU's recent ruling in the case *Traghetti del Mediterraneo Spa v. Italy*.⁶³⁷

State Liability for Judicial Breaches limited by the Source of the Judicial Act:

The Case of AUSTRIA

I. The Existing Regime of State Liability for Judicial Acts in Austria

Despite the undeniable fact that the Austrian example is topical, a further reason for its relevance is that *Köbler* provoked immediate reactions from scholars in Austria, the repercussions of which even influenced a recent reform project on the Austrian Constitution, which was developed by a high-level group of experts at the time.⁶³⁸ In fact, not long after the CJEU's ruling at the end of September 2003, the first initiatives and proposals emerged in the doctrine calling for a substantial

⁶³⁶ The so-called '*Richterspruchprivileg*' (or also '*Spruchrichterprivileg*') of Article 839(2) para. 1 of the German BGB. See under FN 633 as well as SCHÖNDORF-HAUBOLD, "Die Haftung...", *supra* note 110, pp. 114 *et seq.*

⁶³⁷ C-173/03, *Traghetti*, *supra* note 134, paras. 1 *et seq.*

⁶³⁸ We will look at the details of the reform programme at a later stage of this chapter. For general information on the so-called '*Österreich Konvent*' see www.konvent.gv.at/K/Willkommen_Portal.shtml.

overhaul of the current legal framework of State liability in Austria, especially with respect to violations committed by the judiciary.⁶³⁹ As straightforward as the Austrian system might appear at first glance, the problems of its application have been evident in practice and became even more obvious in light of *Köbler*. Despite the various substantive legal inconsistencies surrounding the general framework of public liability in Austria, one of the most troubling issues in the past was related to unresolved procedural questions in this area. The current legal framework in Austria still does not provide for a clear division of competences with regard to public liability claims. However, by now there is at least some clarifying jurisprudence on the matter.⁶⁴⁰ All of the above questions will be addressed in the course of our analysis of the basic features of the Austrian State liability regime.

1. *Tour d'horizon* of the general framework of State liability in Austria

a) The Public Tort Liability Act ('Amtshaftungsgesetz')

The acknowledgment of public liability for damages caused to an individual by organs of the State acting in the performance of their duties, and thus in the exercise of sovereign functions, is one of the basic pillars of the '*Rechtsstaat*'. In fact, it reflects directly the State's inherent duty to act according to the law and the principles of equity and fairness.⁶⁴¹ As in most EU Member States, in Austria the general analysis of all the issues related to the question of State liability also leads to a close interaction between substantive legal elements rooted in public and in private law. An explicit reference to the interface of public and private law elements can even be found in the normative provisions regulating the framework of State liability in Austria, which explicitly declare that the State as a public entity is liable according to the general principles of liability under civil law for any damage incurred by its

⁶³⁹ A similar situation recently emerged in Portugal where the newly enacted law on State liability (Law no. 67/2007 of 31 December 2007) expressly addresses *Köbler*-like situations under national law.

⁶⁴⁰ See especially *Verfassungsgerichtshof*, 10.10.2003, A-36/00.

⁶⁴¹ BERND-CHRISTIAN FUNK, "Staatshaftung auf der Grundlage von Gemeinschaftsrecht: Ein umstrittener und folgenreicher Beitrag des EuGH zur Stärkung der Rechtsgemeinschaft" (1997) *Ecolex* 8, p. 553. See also ERNST HELBLING, "Die Amtshaftung" (1949) *Österreichische Juristen-Zeitung* 14, pp. 365 and 371.

administrative or its judicial organs in the exercise of official duties.⁶⁴² Accordingly, the respective law on public liability in Austria is regarded as a *lex specialis* to the general rules on civil liability as outlined in Articles 1293 *et seq.* of the *Allgemeine Bürgerliche Gesetzbuch (ABGB)*, the Austrian Civil Code.⁶⁴³ Hence, like in many other Member States the State liability regime in Austria is an emanation of the general framework of damages liability under civil law.⁶⁴⁴

Contrary to, for instance, the British system of torts, which remains to a large part uncoded, the Austrian framework of public liability rests at least with respect to its substantive rules on a firm statutory basis. The general principle of State liability is embedded in the Austrian Constitution, the *Bundes-Verfassungsgesetz (B-VG)*,⁶⁴⁵ and is further regulated in the *Amtshaftungsgesetz*,⁶⁴⁶ which is an ordinary law containing the detailed provisions for the enactment of the State's liability for loss or damage caused to an individual by public organs in the exercise of their official duties. Article 23(1) of the Austrian Constitution contains the core regulation on this question, which declares that

⁶⁴² Article 1(1) *AHG*. See FUNK, "Staatshaftung...", *supra* note 641, p. 553, FERDINAND KOPP, "Die Staatshaftung in rechtsvergleichender Sicht" in J. Aicher (ed.), *Die Haftung für staatliche Fehlleistungen im Wirtschaftsleben* (Vienna, Orac, 1988), pp. 55-56 and INGRID MEIER, "Prozeßkosten und Amtshaftung" (1979) *JBl* 23/24, p. 619.

⁶⁴³ In fact, the State is liable according to the rules on civil liability when engaging in private economic activities ('*Privatwirtschaftsverwaltung*'). On the question of liability of the State in its public versus its private functions see JOSEF AICHER, "Das System der Haftung für staatliches Fehlverhalten" in J. Aicher (ed.), *Die Haftung für staatliche Fehlleistungen im Wirtschaftsleben* (Vienna, Orac, 1988), pp. 2 *et seq.*, ERICH FEIL, *Amtshaftung* (Eisenstadt, Prugg Verlag, 1980), p. 6 and CLEMENS JABLONER, "Die Feststellung der Rechtswidrigkeit eines Bescheides im Amtshaftungsverfahren durch den VwGH" in J. Aicher (ed.), *Die Haftung für staatliche Fehlleistungen im Wirtschaftsleben* (Vienna, Orac, 1988), p. 295.

⁶⁴⁴ Apart from Austria, we also find such systems of public liability, amongst others, in Greece, Luxembourg, the Netherlands and Belgium. For Austria, see FEIL, *Amtshaftung*, *supra* note 543, p. 7 and PHILIPP SUTTER, "Die Verjährung von Staats-, Amts- und Organhaftungsansprüchen" in M. Holoubek and M. Lang (eds.), *Organhaftung und Staatshaftung in Steuersachen* (Wien, Linde Verlag, 2002), p. 311.

⁶⁴⁵ Federal Constitutional Law, Federal Law Gazette No. 1/1930 as amended by Federal Law Gazette I No. 100/2003. Hereinafter also referred to as "*B-VG*".

⁶⁴⁶ *Bundesgesetz vom 18. Dezember 1948, womit die Haftung des Bundes, der Länder, der Bezirke, der Gemeinden und der sonstigen Körperschaften und Anstalten des öffentlichen Rechts für den in Vollziehung der Gesetze zugefügten Schaden geregelt wird (Amtshaftungsgesetz)*, BG 18.12.1948, BGBl Nr. 20/1949 idF BGBl 60/1952, 218/1956, 33/1959, 422/1974, 204/1982, 537/1984, 104/1985, 233/1988, 343/1989, 91/1993 and most recently amended by BGBl Nr. 194/1999. Hereinafter also referred to as "*AHG*".

[t]he Federation, the Länder, the districts, the municipalities and the other bodies and institutions established under public law are liable for the injury which persons acting on their behalf in execution of the laws have by illegal behaviour culpably inflicted on whomsoever.⁶⁴⁷

The Constitution therefore defines in a general manner the basic concept of State liability (*'Amtshaftung'*) and introduces a regime of public liability for damages caused by public authorities while acting in the performance of their official duties. The constitutional provision of Article 23(1) of the Constitution spells out the core elements of the national State liability regime and is complemented by the 'Federal Law of 18 December 1948 regulating the liability of the Federation, the government of the Länder, the districts and the municipalities and the other bodies and institutions under public law for any damage resulting from the implementation of the law (Public Tort Liability Act - *AHG*)'.⁶⁴⁸ This law has been enacted on the basis of Article 23(4) of the Constitution in order to clarify and to refine the basic constitutional principle enshrined in Article 23(1) *B-VG*.⁶⁴⁹

Furthermore, according to Article 23(1) *B-VG* in combination with Article 1(1) of the *AHG* the State liability regime in Austria is fault-based, which implies that the State is only liable if the conduct of its organs involves a certain degree of fault on their part. This basic feature of the system labels Austria not only as a member of group II, but also as a candidate for group III of our cartography. Austria is therefore one of the countries qualifying for two different groups of our classification scheme,

⁶⁴⁷ Article 23(1) *Bundes-Verfassungsgesetz*: "Der Bund, die Länder, die Bezirke, die Gemeinden und die sonstigen Körperschaften und Anstalten des öffentlichen Rechts haften für den Schaden, den die als ihre Organe handelnden Personen in Vollziehung der Gesetze durch ein rechtswidriges Verhalten wem immer schuldhaft zugefügt haben." An official English translation is available at www.ris.bka.gv.at/erv/erv_1930_1.pdf.

⁶⁴⁸ *Bundesgesetz vom 18. Dezember 1948, womit die Haftung des Bundes, der Länder, der Bezirke, der Gemeinden und der sonstigen Körperschaften und Anstalten des öffentlichen Rechts für den in Vollziehung der Gesetze zugefügten Schaden geregelt wird (Amtshaftungsgesetz)*, StF: BGBl. Nr. 20/1949. For a complete English translation of the Austrian Public Tort Liability Act see www.ris.bka.gv.at/erv/erv_1949_20.pdf. For a detailed commentary of the *AHG* see for example FEIL, *Amtshaftung*, *supra* note 543, pp. 5 *et seq.*

⁶⁴⁹ Under Austrian law the *AHG* carries the connotation of a '*Durchführungsgesetz*', that is an ordinary law regulating in detail all the substantive and procedural elements necessary in order to guarantee the full implementation of a basic constitutional principle, such as Article 23(1) *B-VG* in this context.

group II and group III. Accordingly, Austria will be categorized under both groups. As we will devote the entirety of the next chapter to the analysis of the third group of our classification scheme, we will at this point limit the discussion to the basic fault-related elements of the Austrian concept of State liability. However, in the course of chapter V, which will be outlining the third group of our classification, we will then return to the fault-based elements peculiar to the Austrian legal framework of State liability.⁶⁵⁰

Contrary to the basic concept of fault under Austrian civil law, which generally embraces both subjective and objective elements, the country's Public Tort Liability Act (the *AHG*) is attached to an understanding of fault, which is reduced to objective criteria only.⁶⁵¹ This particular feature of the Austrian public liability regime also arises out of the fact that according to Article 2(1) of the *AHG* State liability claims in Austria do not – contrary to claims of civil liability – require the harmed individual to identify unequivocally the perpetrator of the act. Instead, it suffices in this context to prove merely that the damage had been committed by an organ of the State, without having to name it precisely.⁶⁵² Since the definition of fault based on subjective criteria necessitates a detailed analysis of the perpetrator's behaviour in order to determine whether he or she acted negligently or with clear intent, the more general provisions concerning State liability in Austria do not require such proof.⁶⁵³ Nevertheless, the explicit referral to a fault-based public liability regime in Article 23(1) *B-VG* and Article 1(1) *AHG* therefore led to the introduction of a concept of fault, which is based on objective criteria.⁶⁵⁴ Rather than the subjective motivation of the perpetrator, fault in this case is defined from an objective perspective by the fact that the acting

⁶⁵⁰ As mentioned before, a detailed analysis of those countries, which base the concept of State liability for judicial breaches upon the degree of fault involved in the harmful act is provided under chapter V, as exemplified by the case of France. For a tabular overview of all the countries pertaining to group III see p. 306.

⁶⁵¹ BIRGIT SCHOIßWOHL, *Staatshaftung wegen Gemeinschaftsrechtsverletzung: Anspruchsgrundlage und materielle Voraussetzungen; zugleich ein Beitrag zur Gemeinschaftshaftung* (Vienna, Springer Verlag, 2002), pp. 206 *et seq.*

⁶⁵² Article 2(1) *AHG*: “Bei Geltendmachung des Ersatzanspruches muß ein bestimmtes Organ nicht genannt werden; es genügt der Beweis, daß der Schaden nur durch die Rechtsverletzung eines Organes des beklagten Rechtsträgers entstanden sein konnte.”

⁶⁵³ Article 2(1) *AHG*.

⁶⁵⁴ See also MEIER, “Prozeßkosten...,” *supra* note 642, pp. 625 *et seq.*

organ did not apply the necessary common standards of diligence generally required when performing the harmful act. Subjective elements are to be entirely factored out in this case and a single standard of diligence applies.⁶⁵⁵ The “objective interpretation” of the condition of fault under Article 23 B-VG can be based directly on Article 2(1) *AHG*. Due to the fact that the constitutional provision of Article 23 B-VG merely sets up the minimum standards for the State’s liability, the loosening of the requirement of fault in a federal law therefore does not constitute a violation of the Austrian Constitution.⁶⁵⁶

Apart from the substantive restriction of State liability claims to acts of the executive and the judiciary, the Austrian *AHG* explicitly provides for two additional procedural limitations. First, a public liability claim cannot be lodged by an individual if the injured party could have avoided the loss or damage by making use of a legal remedy. Article 2(2) *AHG* stipulates that this rule applies if there had been a possibility of lodging an appeal or even the option of bringing a complaint in front of the Austrian Supreme Administrative Court.⁶⁵⁷ However, the sanction only concerns that part of the overall damage, which could have been avoided by making use of the regular appellate proceedings.⁶⁵⁸ This additional procedural element is a feature, which we will encounter repeatedly in various Member States, even in different groups of our classification scheme.

⁶⁵⁵ As it is not immediately relevant for topical focus of this study, we will elide the difficult issue under Austrian law in this context of where to draw the line between the concepts of ‘*Rechtswidrigkeit*’ on the one hand and the ‘*objektive Vorwerfbarkeit des Verschuldens*’ on the other.

⁶⁵⁶ MEIER, “Prozeßkosten...,” *supra* note 642, p. 628.

⁶⁵⁷ Article 2(2) *AHG*: “*Der Ersatzanspruch besteht nicht, wenn der Geschädigte den Schaden durch Rechtsmittel oder durch Beschwerde an den Verwaltungsgerichtshof hätte abwenden können.*” In German the duty to avert the damage by appeal or any other legal remedy is referred to as “*Schadensminderungspflicht*” or “*Rettungspflicht*”. If the individual negligently missed out on this opportunity, the mere abstract existence of such a possible legal remedy is enough to preclude the State liability claim. For further references on this particular issue see DANIELA TOMASOWSKY and CHRISTOPH URTZ, “Haftung bei Säumnis von Gerichten und Verwaltungsbehörden” in M. Holoubek and M. Lang (eds.), *Organhaftung und Staatshaftung in Steuersachen* (Wien, Linde Verlag, 2002), pp. 266 *et seq.*, SCHWARZENEGGER, “Die Subsidiarität...,” *supra* note 148, pp. 357-372; also ROBERT WALTER and HEINZ MAYER, *Grundriß des österreichischen Bundesverfassungsrechts*, 9th ed. (Vienna, Manzsche Verlags- und Universitätsbuchhandlung, 2000), Rz. 1294 and MEIER, “Prozeßkosten...,” *supra* note 642, pp. 623 *et seq.*

⁶⁵⁸ For more details on the precise application of this rule under Austrian law see TOMASOWSKY and URTZ, “Haftung...,” *supra* note 657, pp. 267 *et seq.*

b) State liability for breaches by the national legislature

According to the precise wording of Article 23(1) *B-VG*, the State organs which are potentially able to trigger the State's liability include any natural person acting "in the implementation of laws."⁶⁵⁹ While the constitutional provision itself does not specify any further the public organs which are to be included under this definition, the official commentary to Article 23 *B-VG* clarifies that the expression "*in Vollziehung der Gesetze*"⁶⁶⁰ is to be interpreted as merely embracing the administrative and the judicial branches of the State.⁶⁶¹ Consequently, it can already be tentatively assumed from the Constitution that the liability regime in Austria does not include the concept of State liability for acts or omissions by the national legislature.⁶⁶² This view is supported by the total absence of either substantive or procedural legal provisions within the domestic legal order regulating liability claims of such sort. The related jurisprudence and the doctrine have interpreted the silence of the legislature in this context as being tantamount to a general repudiation of the concept of State liability for legislative breaches in Austria.⁶⁶³ Confirmation thereof is also provided in the wording of Article 1(2) of the Public Tort Liability Act (*AHG*), which unambiguously interprets the phrase of "in the implementation of laws" as to embrace only the executive and the judiciary.⁶⁶⁴

⁶⁵⁹ Article 23(1) *B-VG*.

⁶⁶⁰ To be translated as "in the implementation of laws". See text of Article 23(1) *B-VG*.

⁶⁶¹ The official commentary (514 BlgNR 5. GP) to Article 23 *B-VG* specifies, "*dass sich die Amtshaftung für üble Verwaltung nur auf Handlungen und Unterlassungen bezieht, die in Ausübung der Gerichtsbarkeit und der Verwaltung (der sogenannten Hoheitsverwaltung) unterlaufen*" (emphasis added).

⁶⁶² Critical on this point HELBLING, "Amtshaftung...", *supra* note 641, p. 366. See also AICHER, "Das System...", *supra* note 643, p. 26 and HANS KLECATSKY, "Notwendige Entwicklungen des österreichischen Amtshaftungsrechts" (1981) *JB* 5/6, p. 113.

⁶⁶³ In this context, see judgments by the Austrian Constitutional Court, *Verfassungsgerichtshof*, VfSlg 3287/1957 and *Verfassungsgerichtshof*, 15.06.1992, VfSlg 13.079/1992 *et al.* See also ROBERT REBHACH, *Staatshaftung wegen mangelnder Gefahrenabwehr: Eine Studie insbesondere zur österreichischen Amtshaftung mit einem Beitrag zum Kausalzusammenhang im Schadenersatzrecht* (Vienna, Manz, 1997), pp. 44 *et seq*; KARL VRBA and ALFONS ZECHNER, *Kommentar zum Amtshaftungsrecht* (Vienna, Orac, 1983), pp. 44 *et seq.* and AICHER, "Das System...", *supra* note 643, pp. 25 *et seq.*

⁶⁶⁴ Article 1(2) *AHG*: "*Organe im Sinne dieses Bundesgesetzes sind alle physischen Personen, wenn sie in Vollziehung der Gesetze (Gerichtsbarkeit oder Verwaltung) handeln, gleichviel, ob sie dauernd oder vorübergehend oder nur für den einzelnen Fall bestellt sind, ob sie gewählte, ernannte oder sonst wie bestellte Organe sind und ob ihr Verhältnis zum Rechtsträger nach öffentlichem oder privatem Recht*

The exclusion of the legislative branch from the general State liability regime certainly runs contrary to the wide scope of attribution of public liability on the Community level, which embraces all three branches of the State. However, on this point the Austrian regulation is similar to that in a number of other Member States such as, for example, the Netherlands, Ireland, the Czech Republic, United Kingdom, Slovakia and Germany.⁶⁶⁵ All these countries reject the possibility of claiming damages from the State for allegedly harmful acts or omissions of the national legislature.⁶⁶⁶ As formulated in Article 23(1) *B-VG* and Article 1(2) *AHG* the public authorities assuming the State's liability in Austria are reduced to those organs acting "in the implementation of laws",⁶⁶⁷ which – as previously demonstrated – means the administrative branch and the judiciary.⁶⁶⁸

c) State liability for judicial breaches: Analysis of Article 23(1) of the Austrian Constitution in conjunction with Article 2(3) *AHG*

As regards the source of the judgment, only the Republic of Austria and the Kingdom of Sweden limit State liability to the decisions of ordinary courts, excluding those of supreme courts.⁶⁶⁹

In Austria, the question of the applicability of the general State liability regime to judicial violations is also expressly regulated in the *AHG*. However, whereas Article 23(1) *B-VG* and Article 1(2) *AHG* broadly recognize the application of this

zu beurteilen ist" (emphasis added). See legal commentary on Article 1(2) *AHG* in FEIL, *Amtshaftung*, *supra* note 543, p. 12 and SCHOIBWOHL, *Staatshaftung*, *supra* note 651, pp. 204-205.

⁶⁶⁵ Concerning the German system of State liability, we will exclude from our analysis the special legal regimes of quasi-expropriation ('*enteignungsgleicher Eingriff*') and expropriatory measures ('*enteignender Eingriff*') and other elements related to the '*Aufopferungsprinzip*' ('sacrifice'-principle) and possible compensation payments which could arise in this context. See also the brief overview on the concept of State liability for legislative breaches in a variety of EU Member States in RHONA FETZER, *Die Haftung des Staates für legislatives Unrecht: Zugleich ein Beitrag zum Staatshaftungsrecht der Europäischen Gemeinschaften, der EG-Mitgliedstaaten, der Schweiz und Österreichs* (Berlin, Duncker & Humblot, 1994), pp. 191 *et seq.*

⁶⁶⁶ In this context see the following rulings of the Austrian Constitutional Court: *VfGH*, VfSlg. 13.079/1992; *VfGH*, VfSlg. 3287/1957.

⁶⁶⁷ Article 23(1) *B-VG*.

⁶⁶⁸ On this question see also FUNK, "Staatshaftung...", *supra* note 641, p. 553 and FETZER, *Die Haftung...*, *supra* note 665, pp. 202 *et seq.*

⁶⁶⁹ Opinion Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 81.

principle also to damages inferred by acts of the national judiciary, Article 2(3) of the *AHG* nevertheless restricts the invocation of such liability depending on the source of the judicial act by stating that

[a] decision of the Constitutional Court, the Supreme Court in civil and commercial, social security, employment law and criminal law matters, and the Supreme Administrative Court shall not give rise to a right to redress.⁶⁷⁰

Article 2(3) *AHG* unequivocally declares that the State's liability for any decision or act of the three Austrian superior courts is excluded without reservation.⁶⁷¹ As a result, in order to shield decisions of final instance courts from indirect review in the course of liability proceedings, all judgments taken by the Austrian Constitutional Court ('*Verfassungsgerichtshof*'),⁶⁷² the Supreme Administrative Court ('*Verwaltungsgerichtshof*')⁶⁷³ and the Supreme Court in civil, commercial, social security, employment law and criminal law matters ('*Oberste Gerichtshof*')⁶⁷⁴ are precluded without exception from the general, constitutionally-based principle of State responsibility for acts performed by the national judiciary.⁶⁷⁵

While, as we have seen in the previous chapter the United Kingdom provides for a comprehensive veil of immunity for all acts of the judiciary in section 2(5) of the Crown Proceedings Act 1947,⁶⁷⁶ the Austrian system is more selective in this respect

⁶⁷⁰ Article 2(3) *Amtshaftungsgesetz* as translated in the Opinion of Advocate General Léger in Ibid, para. 5. Original wording in German: "Aus einem Erkenntnis des Verfassungsgerichtshofes, des Obersten Gerichtshofes und des Verwaltungsgerichtshofes kann ein Ersatzanspruch nicht abgeleitet werden." See commentary on Article 2(3) *AHG* in FEIL, *Amtshaftung*, *supra* note 543, p. 48.

⁶⁷¹ We will be using the expression 'superior courts' throughout this chapter in order to refer to the three highest courts in Austria: the '*Verfassungsgerichtshof*', the '*Verwaltungsgerichtshof*' and the '*Oberste Gerichtshof*'.

⁶⁷² Hereafter also referred to as "*VfGH*".

⁶⁷³ Hereafter also referred to as "*VwGH*".

⁶⁷⁴ Hereafter also referred to as "*OGH*".

⁶⁷⁵ See, amongst others, HARALD DOSSI, "Geltendmachung der EU-Staatshaftung in Österreich: die Praxis in einem System unvollständiger Rechtsgrundlagen" (2000) *Ecolex*, p. 340; RUDOLF WELSER, "Öffentlichrechtliches und Privatrechtliches aus Anlaß einer Amtshaftungsklage" (1975) *JBl*, p. 237; FUNK, "Staatshaftung...", *supra* note 641, p. 553 and MEIER, "Prozeßkosten...", *supra* note 642, p. 624.

⁶⁷⁶ This is true apart from a very small number of exceptions. See analysis of the system of public liability in England and Wales in chapter III of the thesis.

and shields only those judicial acts which emanate from one of the three highest courts within the national judicial hierarchy from public liability claims. Put briefly, apart from the requirement of a qualified fault, the basic restriction to the concept of State liability for judicial breaches in Austria is the rule that no claim for indemnity can be based on an act performed by either one of these three courts.⁶⁷⁷ Moreover, the judgment of a court of final instance also automatically protects all those rulings issued by lower instance courts in the course of the same proceedings, which ruled in accordance with the final ruling. Interestingly enough, this means that in case one of the three superior courts issues an erroneous judgment, Article 2(3) *AHG* not only protects this final decision, but also all concurring – even if erroneous – judgments declared by lower instance courts in the course of the proceedings in the same case.⁶⁷⁸ The rationale behind this rule is once again based on the need to protect the three courts of last instance from an indirect review of their jurisprudence *qua* liability proceedings, which are lodged against a concurring judgment of a lower instance court in the same proceedings.

Nevertheless, the fact that the constitutional provision of Article 23 *B-VG* contains no direct reference to the special immunity awarded to the highest courts in the country initially led to controversy in the literature. While Klecatsky⁶⁷⁹ classified the exemption contained in Article 2(3) *AHG* as amounting to a violation of the Austrian Constitution, the writings of Walter and Mayer,⁶⁸⁰ as well as those of Walter Schragel⁶⁸¹ all base the rationale behind Article 2(3) *AHG* on the unwritten principle of *litis finiri oportet*. This maxim, which conforms to the principle of *res judicata*, embraces the argument that for the purposes of arriving at a final decision there ought to be a limit to the principle of legal protection of the individual. Moreover, according

⁶⁷⁷ TOMASOWSKY and URTZ, "Haftung...", *supra* note 657, p. 266.

⁶⁷⁸ MEIER, "Prozeßkosten...", *supra* note 642, p. 624. See *Oberste Gerichtshof*, 25.08.1993, 1 Ob 10/93.

⁶⁷⁹ KLECATSKY, "Notwendige Entwicklungen...", *supra* note 662, pp. 115 *et seq.* In a similar manner KOPP, "Staatshaftung...", *supra* note 642, p. 59. Doubts about the conformity of Article 2(3) *AHG* with the Austrian Constitution were already raised immediately after the enactment of the Public Tort Liability Act in February 1949. See, for example, HELLBLING, "Amtshaftung...", *supra* note 641, p. 366.

⁶⁸⁰ WALTER and MAYER, *Grundriß...*, *supra* note 557, p. 1996, para. 1294.

⁶⁸¹ WALTER SCHRAGEL, *Amtshaftungsgesetz*, 2nd ed. (Vienna, Manz, 1985), para. 196.

to their opinion, this was the only way to avoid a potential cascade of actions for damages against final decisions taken by one of the Austrian supreme courts.⁶⁸² In support of the latter opinion, Klagian even suggested elevating section 2(3) *AHG* to the rank of a constitutional norm.⁶⁸³

The same arguments resurfaced again in the observations of various governments in *Köbler* and are still used by critical voices in the literature today to oppose an all-embracing concept of State liability for judicial breaches on the national level.⁶⁸⁴ In fact, a similar set of arguments reoccurs throughout the EU-wide debate on this question. As we have previously observed in the case of the Netherlands, the United Kingdom and Ireland, in Austria too one of the core objections against the implementation of a comparable State liability regime was that the particular role of courts of last instance within the national judicial hierarchy had to be protected. What this entails is shielding them from the possibility that a direct or indirect review of their final decisions in the course of an action for damages against the State would not only violate the principle of *res judicata*, but would also prolong the proceedings *ad infinitum*. This reasoning underlined once again the importance of the principle of finality for judicial proceedings.⁶⁸⁵

In the literature on this question, authors try to caution against the potential danger of an infinite circularity of legal proceedings. Accountability of courts of last instance *qua* State liability would entail that, for instance, a judgment of the *Oberster Gerichtshof* could give rise to a claim for damages and lead to an indirect revision of the final judgment in secondary proceedings. Accordingly, even an implicit review of the case in the course of liability proceedings would constitute a direct affront to the principle of legal certainty, which stipulates that proceedings should come to an end at

⁶⁸² In German this principle is called “*Grenze des Rechtsschutzes*”.

⁶⁸³ WILHELM KLAGIAN, “Die Staatshaftung nach Gemeinschaftsrecht: Die Haftung der Mitgliedstaaten für Verletzungen des Gemeinschaftsrechts unter besonderer Berücksichtigung der Auswirkungen auf das österreichische Amtshaftungsrecht” (1997) *ZfRV*, p. 20.

⁶⁸⁴ See observations submitted to the CJEU by the governments of the UK, Austria and France in C-224/01, *Köbler*, *supra* note 1, paras. 20 *et seq.*

⁶⁸⁵ See BRIGITTA JUD, “Staatshaftung für judikatives Unrecht” (2003) *Ecolex*, p. 386. On this point see also the judgment *OGH*, 1 Ob 10/93, *supra* note 678.

the level of courts of last instance.⁶⁸⁶ In sum, the three superior courts constitute so-called '*Grenzorgane*',⁶⁸⁷ which are organs bound by law, but whose decisions cannot be subject to any legal control including direct or indirect review by another organ of the State.⁶⁸⁸

Finally, and somewhat connected to the previous argument, the Austrian Constitution guarantees an institutional balance and parity between the three national supreme courts.⁶⁸⁹ The possibility of claims for damages for an allegedly erroneous decision of a national supreme court would invoke the competence of the special 'Supreme Liability Chamber' of the *Oberste Gerichtshof*,⁶⁹⁰ which, according to the law of civil procedure, generally constitutes the final instance in State liability proceedings. However, a final judgment by the aforementioned Chamber would not only impair the constitutional imperative of maintaining an equal balance between the national supreme courts in Austria, but it would also elevate the position of the Supreme Liability Chamber of the *Oberste Gerichtshof* to the highest judicial instance, which would be charged with the questionable duty of reviewing – even if only in an implicit manner – final decisions taken by one of the other national supreme courts.⁶⁹¹ Such a possibility would, according to the aforementioned authors, severely disturb the established national judicial hierarchy and as noted before, also impinge on the constitutional guarantee of absolute parity between the three superior courts.⁶⁹² In light of the debate on whether Article 2(3) *AHG* was compatible with

⁶⁸⁶ WALTER and MAYER, *Grundriß...*, *supra* note 557, p. 531. On this question see also JUD, "Staatshaftung...", *supra* note 685, p. 386 and WELSER, "Öffentlichrechtliches...", *supra* note 675, pp. 237 *et seq.*

⁶⁸⁷ The expression '*Grenzorgane*' has been translated as 'borderline institutions' in FRANZ C. MAYER, "The European Constitution and the Courts" in A. V. Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford/Portland, Oregon, Hart, 2006), pp. 312 *et seq.* See also *Oberster Gerichtshof* in *OGH*, 1 Ob 10/93, *supra* note 678, as well as MEIER, "Prozeßkosten...", *supra* note 642, p. 624.

⁶⁸⁸ JUD, "Staatshaftung...", *supra* note 685, p. 386.

⁶⁸⁹ SCHOISWOHL, *Staatshaftung*, *supra* note 651, pp. 221 *et seq.*

⁶⁹⁰ In the final instance, State liability proceedings in Austria fall under the competence of the first chamber of the Supreme Court in civil and commercial matters. That is why the chamber is also referred to as the '*Amtshaftungssenat des Obersten Gerichtshofes*'.

⁶⁹¹ JUD, "Staatshaftung...", *supra* note 685, p. 386.

⁶⁹² Similar reservations were raised by the Austrian government in the *Köbler* proceedings (C-224/01, *Köbler*, *supra* note 1, para. 21).

Article 23(1) *B-VG*, Meier argued that the restrictions contained in Article 2(3) *AHG* were justified precisely because of the paramount duty to respect the constitutional principle of parity between the *OGH*, the *VfGH* and the *VwGH*. At the same time this implies that apart from the three Supreme Courts, liability proceedings can be based on an act by any other court, even if ruling in the function of court of last instance, can never be excluded by law.⁶⁹³

While, as we mentioned before, the relevance of these principles was initially challenged in the literature,⁶⁹⁴ their weight and significance was in the end explicitly confirmed in the jurisprudence. The groundbreaking ruling in this respect was the judgment of the *Oberste Gerichtshof* of 25 August 1993.⁶⁹⁵ In this specific case the *Oberste Gerichtshof* was directly confronted with the question as to whether the quasi-immunity of the superior courts was justified under the Austrian Constitution. Hence, the *OGH* was finally forced to clarify whether Article 2(3) *AHG* was in fact compatible with the constitutional principles enshrined in Article 23 of the *B-VG*.

The case, which dealt with an alleged violation of procedural guarantees in criminal case, prompted the claimant to initiate liability proceedings against the State. Based on the argument that decisions of superior courts in Austria could never give rise to State liability, the claim had been dismissed in the first two instances. In the final instance, the *Oberste Gerichtshof* was then asked to rule on whether the established *Haftungsprivileg*, i.e. the principle of immunity of superior courts in Austria, was justified under the general constitutional principle of State liability as defined in Article 23 of the Austrian Constitution. In its landmark ruling of 25 August 1993 the *Oberste Gerichtshof* stated that even though the legal provision establishing the exclusion of the three superior courts from the general State liability scheme was not at constitutional, but rather at federal law level, the reasoning behind this exception was motivated by a number of reasons and principles, which found their

⁶⁹³ MEIER, "Prozeßkosten...", *supra* note 642, p. 625.

⁶⁹⁴ See for example WALTER and MAYER, *Grundriß...*, *supra* note 557, para. 1294; KLECATSKY, "Notwendige Entwicklungen...", *supra* note 662, pp. 115 *et seq.*; SCHRAGEL, *Amtshaftungsgesetz*, *supra* note 681, Rz 196.

⁶⁹⁵ *OGH*, 1 Ob 10/93, *supra* note 678.

origin in the Austrian Constitution.⁶⁹⁶ Therefore, the *OGH* eventually proclaimed that Article 2(3) of the Public Tort Liability Act was in full compliance with the general constitutional principle of State liability as regulated in Article 23 of the Austrian Constitution.⁶⁹⁷

After this ruling, the general principle of quasi-immunity of the superior courts in Austria has remained almost unchallenged. Nevertheless, exceptions to this so-called '*Haftungsprivileg*' have been established under national law. First, similar to the situation in the countries pertaining in group I, an exception to the general immunity clause was introduced by the European Convention on Human Rights. As demonstrated in the previous chapter, judicial violations of the Convention most frequently relate to guarantees enshrined in Article 6 of the ECHR.⁶⁹⁸ Austria has been a signatory to the ECHR since 1958 and under national law the Convention occupies the status of directly applicable federal constitutional law.⁶⁹⁹ Therefore, judicial violations of the ECHR mark without doubt an exception to the superior courts' protective immunity in Austria. While a court's violation of the Convention does not affect the validity of the judgment itself, it nevertheless allows for "just satisfaction" to be awarded to the harmed individual.⁷⁰⁰ Moreover, under Austrian law there are also special provisions to compensate victims of unjustified detention on

⁶⁹⁶ Ibid: "Wenn auch dem Wortlaut des Art. 23 Abs. 1 B-VG als der verfassungsrechtlichen Grundlage des Amtshaftungsrechts ein solcher Haftungsausschluß unmittelbar nicht entnommen werden kann, so wird im Schrifttum doch ganz überwiegend die Auffassung vertreten, § 2 Abs. 3 des Amtshaftungsgesetzes [...] entspringe der dem bundesverfassungsgesetzlichen Gebot zur Amtshaftung und deren näheren bundesgesetzlichen Ausgestaltung immanenten Überlegung, daß dem damit gewährten Rechtsschutz auch Grenzen zu setzen sind, um letztlich eine endgültige Entscheidung herbeizuführen. [...] Der Oberste Gerichtshof hält daher den im § 2 Abs. 3 AHG festgelegten Haftungsausschluß für verfassungskonform."

⁶⁹⁷ Ibid.

⁶⁹⁸ A statistical analysis has shown that in the time-period from 2000 to 2003, almost 60% of all Austrian cases decided in front of the ECtHR dealt with alleged violations of Article 6 ECHR. As in INGRID SIESS-SCHERZ, "Die Haftung Österreichs nach der Feststellung einer Verletzung der Europäischen Menschenrechtskonvention durch den EGMR", *Haftung für staatliches Handeln - Österreichische Richterwoche*, 12.-16. Mai 2003 (Wien, Bundesministerium für Justiz, 2003), p. 105. For a detailed analysis of the ECHR and its effect on breaches of the Convention by the judiciary of a Signatory State see chapter III, pp. 138 *et seq.* With respect to Austria see also THEO ÖHLINGER, "Austria and Article 6 of the European Convention on Human Rights" (1990) *EJIL* 1, pp. 286-291.

⁶⁹⁹ *BGBI.* 210/1958 in combination with *BVG BGBI.* Nr. 59/1964. KLECATSKY, "Notwendige Entwicklungen...", *supra* note 662, p. 115 and p. 120. See also SIESS-SCHERZ, "Die Haftung Österreichs...", *supra* note 698, pp. 102-104.

⁷⁰⁰ Article 41 ECHR.

remand and false conviction.⁷⁰¹ However, as previously stated, compensation payments of that sort are strictly speaking not to be regarded as acts of State liability.⁷⁰²

This feature of the Austrian regime of State liability, an absolute immunity from suit for decisions of particular courts or specific judicial instances, is a characteristic trait of national liability regimes pertaining to group II of our legal taxonomy. The immunity of the superior courts of Austria is not to be equated with a system precluding State liability claims for all judicial acts, such as in the United Kingdom, nor is it similar to a national framework excluding State liability for judicial breaches for all judicial acts which have acquired the authority of *res judicata*. The latter is a system which we will encounter in group IV of our classification scheme and which applies to countries such as Belgium and Luxembourg.⁷⁰³ Even though it is the case that in Austria judgments of the three supreme superior will also inevitably be cloaked with the authority of *res judicata*, the restrictions in group IV nevertheless extended further than that to preclude liability claims for all judicial acts having acquired the status of *res judicata*, be it the decision of a supreme court or any other ruling by a court of lower instance, which has not been appealed within the designated timeframe and has thus become final and practically irrevocable.⁷⁰⁴

d) The Swedish model

A public liability regime which shares the particularities we find in the Austrian case and at the same time also features restrictions to its liability scheme that go beyond the immunity of the highest courts, is the framework of State liability in Sweden.⁷⁰⁵ Generally speaking, Swedish State liability is a fault-based regime, which

⁷⁰¹ *Strafrechtliches Entschädigungsgesetz* 2005, BGBl. I Nr. 125/2004, available at www.ris2.bka.gv.at/Bundesrecht.

⁷⁰² See discussion in chapter II, p. 60.

⁷⁰³ See chapter VI, pp. 308 *et seq.*

⁷⁰⁴ For a detailed analysis of the countries falling under the fourth group of our classification see chapter VI.

⁷⁰⁵ Similar to the Austrian case the State liability regime in Sweden therefore not only classifies for group II but also for group III of our classification. Apart from Advocate General Léger's Opinion in

implies that the State is only liable in cases of intentional or negligent acts.⁷⁰⁶ This additional feature qualifies the country not only for group II of our classificatory scheme, but additionally also renders it an eligible candidate for group III, which we will, however, analyse in detail in the next chapter.⁷⁰⁷ The relevant procedural rules concerning liability claims against the State in Sweden are regulated in the Code of Judicial Procedure (*Rättegångsbalken*). The latter also awards exclusive competence to ordinary courts to rule in such cases.⁷⁰⁸

Similar to § 2(3) of the Austrian *AHG*, Swedish law also contains a specific statutory provision, namely Chapter 3 Section 7 of the Swedish Tort Liability Act (*Skadeståndslagen*), which lists the exceptions to the general public liability regime. Acts of the Government (*Regeringen*), the Swedish Parliament (*Riksdagen*) and the two Supreme Courts (*Högsta domstolen* and *Regeringsrätten*) are exempted from the general scheme of State liability. Any claims for compensation which are raised against an act of the above organs are to be declared inadmissible. With respect to the two Supreme Courts, not only decisions, but also omissions, i.e. the failure or refusal to render a decision, are covered by the exemption in Chapter 3 Section 7 of the Swedish Tort Liability Act. Hence, like in the case of Austria, one of the most prominent features of the Swedish public liability scheme is the exemption of all acts of its Supreme Courts from liability claims against the State. Furthermore, this

the *Köbler* case, the similarity between the Austrian and the Swedish system of State liability has also been confirmed by Peter Jann, former Judge at the CJEU, in JANN, "Neuere Entwicklungen....," *supra* note 3, p. 30.

⁷⁰⁶ Chapter 3 Section 2 of the Swedish Tort Liability Act.

⁷⁰⁷ See chapter V, pp. 229 *et seq.*

⁷⁰⁸ In addition to regular court proceedings, Swedish law also recognizes a special mechanism of alternative dispute resolution for individual claims of State liability, which we will however not address in detail at this point. According to this procedure, the Chancellor of Justice (*Justitiekanslern*), who is a non-political civil servant (usually an experienced judge), takes on the role of the mediator between the State and the individual. In fact, he/she handles the majority of damages claims by individuals for breaches of national law or Community law by any organ of the State. Through this mechanism a harmed individual can obtain extra-contractual compensation from the State without having to pay legal fees or undergo judicial proceedings. This system enjoys great popularity in Sweden and nowadays almost all claims of State liability are handled in this way. Nevertheless, without the cloak that the label 'court' provides, it remains doubtful whether such a system complies with the requirements of Article 6 ECHR. Finally, it is important to mention at this point that the alternative dispute resolution mechanism does not preclude the individual's right to claim damages through ordinary court proceedings. For detailed information see BERTIL BENGTTSSON, *Det allmännas ansvar enligt skadeståndslagen*, 2nd ed. (Stockholm, Norstedts juridik, 1996).

protective shield extends also to those – even erroneous – judgments of inferior courts, which have later been conclusively decided by one of the two Supreme Courts. The latter principle is also acknowledged in a similar manner in Austria.⁷⁰⁹

The reasons lying behind the exemption of Swedish Supreme Courts from the general liability scheme are twofold. First, as Advocate General Léger already stated in his Opinion in *Köbler*, “[t]he Swedish legislation excluding State liability for the acts or omissions of supreme courts seems to have been the result of the absence of an appropriate national court or tribunal to hear any action for damages of that type.”⁷¹⁰ Moreover, there is a general belief that the risk of fault in decisions by the highest courts in Sweden is small enough so as to justify the quasi-exclusion of damages claims.⁷¹¹ Consequently, the immunity of the Supreme Courts in Sweden can only be lifted in one specific case: as soon as the harmful judgment in question has been revoked (declared invalid or changed), the Chapter 3 Section 7 exemption no longer applies and State liability claims can even be invoked against a judgment issued by one of the two Supreme Courts. In practice, these limitations imply that when it comes to acts performed by the Swedish Supreme Court (*Högsta domstolen*) or the Supreme Administrative Court (*Regeringsrätten*), damages can only be awarded if the harmful judgment has been rescinded and changed in a new trial.⁷¹² On a final note it should also be mentioned that under Swedish law separate regulations have been introduced for cases of false imprisonment and unjustified detention on remand.⁷¹³

⁷⁰⁹ See MEIER, “Prozeßkosten...,” *supra* note 642, p. 624.

⁷¹⁰ Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, paras. 80 *et seq.*

⁷¹¹ BENGSSON, *Det allmännas...*, *supra* note 708, *et al.*

⁷¹² See Chapter 3 Section 7 of the Swedish Tort Liability Act (*Skadeståndslagen SFS 1972:207*): “*Talan om ersättning enligt 2 § får inte föras med anledning av beslut av riksdagen eller regeringen eller av Högsta domstolen eller Regeringsrätten, om inte beslutet upphävts eller ändrats. Sådan talan får inte heller föras med anledning av beslut av lägre myndighet, vilket efter överklagande prövats av regeringen, Högsta domstolen eller Regeringsrätten, utan att beslutet upphävts eller ändrats. Lag (1995:24).*”

⁷¹³ See especially Article 2 and Article 4 of the *Lag (1998:714) om ersättning vid frihetsberövanden och andra tvångsåtgärder*.

e) Procedural aspects: questions of competence

As in Sweden, in Austria the competence to rule on liability claims against the State generally also lies with the ordinary courts. The primary reference regarding the rules of competence is Article 9(1) of the *AHG*, which declares that proceedings concerning the State's liability for breaches of law would fall within the inherent jurisdiction of the courts of first instance in civil and commercial matters.⁷¹⁴ This implies that the competence in such cases primarily lies with the Austrian Regional Civil Courts, the Austrian *Landesgerichte*.⁷¹⁵ State liability claims are to be lodged exclusively against the State and can never be brought against the organ responsible for the breach.⁷¹⁶ Accordingly, in cases of State liability brought about by breaches of domestic law, competence is attributed to the civil courts in first instance. Moreover, Article 9(4) *AHG* is a special rule on delegation, which is particularly interesting in light of the focus of our study. It states that in case the liability claim is based on an act performed by a decision of a court of first or second instance and would the same court be competent, directly or in the course of the appellate procedure, to rule on the liability claim, it will be incumbent on the higher instance court to reassign competence in this case.⁷¹⁷ It follows from this provision that if, for example, the *Landesgericht* is faced with the problem of having to decide upon a liability claim

⁷¹⁴ Article 9(1) *AHG*: “Zur Entscheidung über die Klage des Geschädigten gegen den Rechtsträger auf Ersatz und des Rechtsträgers gegen das schuldtragende Organ auf Rückersatz ist in erster Instanz das mit der Ausübung der Gerichtsbarkeit in bürgerlichen Rechtssachen betraute Landesgericht [...] ausschließlich zuständig.” In this context see ALEXANDER BALTHASAR, “Das subjektive (öffentliche) Recht im Amtshaftungsverfahren” (1998) 53 *Österreichische Juristen-Zeitung* 9, pp. 321-323.

⁷¹⁵ For a detailed analysis of all the procedural aspects surrounding State liability claims see, *inter alia*, PETER BÖHM, “Tücken des Amtshaftungsverfahrens” in J. Aicher (ed.), *Die Haftung für staatliche Fehlleistungen im Wirtschaftsleben* (Vienna, Orac, 1988), pp. 235-271 and JABLONER, “Die Feststellung...,” *supra* note 643, pp. 295 *et seq.* See in this context in particular Articles 8, 9(3) & (5), Article 11 and Article 13 *AHG*, as well as Article 11(2) of the Austrian Civil Procedural Order (*ZPO*).

⁷¹⁶ Article 9(5) *AHG*.

⁷¹⁷ Article 9(4) *AHG*: “Wird der Ersatzanspruch aus einer Verfügung des Präsidenten eines Gerichtshofes erster Instanz oder eines Oberlandesgerichts oder aus einem kollegialen Beschluss eines dieser Gerichtshöfe abgeleitet, die nach den Bestimmungen dieses Bundesgesetzes unmittelbar oder im Instanzenzuge zuständig wären, so ist ein anderes Gericht gleicher Gattung zur Verhandlung und Entscheidung der Rechtssache vom übergeordneten Gericht zu bestimmen.” FEIL, *Amtshaftung*, *supra* note 543, pp. 58 *et seq.*

directed against one of its own decisions, it is the *Oberlandesgericht's* duty to delegate the case to a different court of first instance.⁷¹⁸

2. Community law *ante portas*: the application of the *Francovich*-line in Austria in light of the principle of national procedural autonomy

As mentioned in the introductory chapter, there is no explicit statutory basis for the concept of Member State liability within the primary and secondary sources of EU law. Instead, the European Community's framework of liability of its Member States has been developed entirely by the EU's Court of Justice in its extensive case-law on the matter.⁷¹⁹ As previously discussed, in its longstanding jurisprudence the CJEU has established the principle that a Member State failing to comply with its obligations under the EC Treaty would be liable for the damage or loss caused to an individual.⁷²⁰ However, in line with the concomitant principle of national procedural autonomy, the onus is on the Member States to "designate the courts having jurisdiction and to determine [...] the protection of the rights which citizens have from the direct effect of Community law."⁷²¹ In order to achieve this aim, two feasible options are usually available under national law. First, the national judiciary can resort to the direct applicability of Community law as a self-standing cause of action under national law with its own set of procedural guarantees, a method which is used in England and Wales.⁷²² Alternatively, in case there is a comparable domestic legal basis, the courts can interpret national law in conformity with Community law principles, as it has been, amongst others, the traditional practice in France.⁷²³

⁷¹⁸ On Article 9(4) *AHG* see KURT HOFMANN, "Haftung für fehlerhafte Gerichtsentscheidungen insbesondere auch von Höchstgerichten" in M. Holoubek and M. Lang (eds.), *Organhaftung und Staatshaftung in Steuersachen* (Wien, Linde Verlag, 2002), p. 154.

⁷¹⁹ See, *inter alia*, C-6 & 9/90, *Francovich*, *supra* note 2, paras. 1 *et seq*; C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 1 *et seq*; Case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH* [1997] ECR I-4961, paras. 1 *et seq*; C-5/94, *Hedley Lomas*, *supra* note 95, paras. 1 *et seq*; *et al.*

⁷²⁰ For a detailed analysis of the general principle of State liability under EC law see Part I.

⁷²¹ Case 33/76, *Rewe-Zentralfinanz*, *supra* note 143, para. 5. See also CAROL HARLOW, *Accountability in the European Union* (Oxford, Oxford University Press, 2002), pp. 153 *et seq*.

⁷²² See previous chapter III, pp. 114 *et seq*.

⁷²³ On the interaction between French State liability law and EC law see chapter V, pp. 273 *et seq*.

The challenges arising under the latter option certainly lie in the quest for a suitable substantive and procedural ‘avenue’ under national law through which the Community right can be smoothly ‘transplanted’ into the national remedial framework. Therefore, not only with respect to Austria, but also with respect to the other 26 EU Member States, a set of fundamental questions instantly emerges in this context: which legal basis is used under national law in order to enact State liability claims for breaches of Community law? Furthermore, which national court is competent to rule on such issues? And finally, which norms of national procedural law are applicable in these cases? In an attempt to address some of these questions for the case of Austria, the following paragraphs will be divided into two sections dealing with the substantive issues involved on the one hand and the procedural aspects at stake on the other.

At the outset of this analysis it is important to highlight that – similar to the situation in most EU Member States⁷²⁴ – there is currently no explicit provision within the Austrian legal framework regulating the enforcement of State liability claims based on a violation of European Community law.⁷²⁵ In the absence of the creation of an explicit legal basis under national law and in light of the principle of national procedural autonomy, it is therefore for the judiciary to ensure the full application of Community rights, which includes the individual’s right to damages for harm caused to him/her by a breach of Community law.⁷²⁶ In order to safeguard the aggrieved parties’ right to reparation, the predominant opinion in the Austrian legal doctrine as well as the jurisprudence of the national superior Courts acknowledge the application of the national framework of public liability as regulated in the *AHG*.⁷²⁷

⁷²⁴ A survey undertaken in 2001 showed that at this point in time none of the EU Member States had enacted a separate provision in the domestic legal order to regulate the question of State liability for breaches of Community law. See SCHOIBWOHL, *Staatshaftung*, *supra* note 651, p. 121.

⁷²⁵ HARALD DOSSI, "Die gemeinschaftsrechtliche Staatshaftung am Beispiel Österreichs", 'Staatshaftung' - Tagung der Österreichischen Juristenkommission am 28. Oktober 2003 in Wien (Wien/Graz, Neuer Wissenschaftlicher Verlag, 2004), p. 27; DRAGANA DAMJANOVIC, "Zuständigkeit und Verfahren zur Durchsetzung von Staatshaftungsansprüchen gegen den Gesetzgeber" in M. Holoubek and M. Lang (eds.), *Organhaftung und Staatshaftung in Steuersachen* (Wien, Linde Verlag, 2002), p. 132 and JUD, "Staatshaftung....," *supra* note 685, p. 385.

⁷²⁶ SCHOIBWOHL, *Staatshaftung*, *supra* note 651, p. 139.

⁷²⁷ *Bundesgesetz*, 18.12.1948, *BGBI* Nr. 20/1949; see FN 646.

However, the *AHG* is only applicable insofar as it is strictly interpreted in conformity with the principles established on the Community level.⁷²⁸ As a result, similar to the case of France, which we will examine in the following chapter, in Austria national law also provides the framework through which the Community right takes effect on the domestic level.⁷²⁹

A direct comparison of Article 23 *B-VG* and the *AHG* with the fundamental principles of Member State liability under Community law reveals some similarities, but also a number of discrepancies between the two systems. These differences are clearest with respect to the limits, the content and the overall requirements of State liability. It is the first of these issues, the assessment of the limits of State liability on the national versus the Community level, which is of principal interest for the purposes of the present discussion. In fact, on the specific question of attribution, i.e. the process of assigning acts by public authorities to the sphere of a State's liability regime, the two systems are by no means entirely congruent. On the Community level, the CJEU has repeatedly declared in its jurisprudence that the concept of Member State liability embraces breaches of Community law committed by any organ of the State.⁷³⁰ Does the *AHG* comply with the wide scope of attribution presupposed by EC law, which invokes the State's liability for violations of Community law "whichever public authority is responsible for the breach"?⁷³¹

Based on a preliminary assessment, it can be assumed that liability claims for administrative breaches of Community law can be subsumed under the corresponding national provisions of the *AHG* as far as they are in conformity with the requirements established on the Community level. And in fact, this method appears to be uncontested in practice.⁷³² However, similar to the case of England and Wales where

⁷²⁸ See, in particular, REBHACH, "Staatshaftung...", *supra* note 148, p. 759; FUNK, "Staatshaftung...", *supra* note 641, pp. 553 *et seq.* For national jurisprudence on this question see, *inter alia*, *Oberste Gerichtshof*, 06.10.2000, 1 Ob 12/00x and *Oberste Gerichtshof*, 29.01.2002, 1 Ob 213/01g.

⁷²⁹ In a similar manner SCHOIBWOHL, *Staatshaftung*, *supra* note 651, pp. 110 *et seq.*

⁷³⁰ C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 32-35.

⁷³¹ *Ibid*, para. 32.

⁷³² See in particular *Verfassungsgerichtshof*, 06.03.2001, A-23/00 *et al.*

we encounter an extensive scheme of legal protection shielding acts by the legislature and the judiciary from liability proceedings, we are now faced with similar but not as far-reaching restrictions under Austrian law. As mentioned before, in Austria the State's liability is expressly precluded for legislative wrongs as well as for erroneous acts by the national superior courts. Hence, if an individual claims damages due to a violation of Community law by the legislature or by a national superior court, several intricate legal issues will have to be considered under national law concerning the interaction between the related Community law principle and the domestic legal basis for the claim. The principle of parliamentary sovereignty and the quasi-infallibility of the national superior courts in the context of Austria's State liability regime evidently stand in stark contrast to the CJEU's inclusive approach on the question of attribution. In theory for cases with Community-law relevance the conflicting national rules in Austria should remain inapplicable as Community law is granted primacy.⁷³³

a) State liability for breaches of Community law by the national legislature

In a judgment of 30 January 2001, the *OGH* expressly confirmed that while the principle of State liability for legislative breaches was a familiar concept under European Community law, it was a concept unknown to the legal system in Austria.⁷³⁴ Despite the absence of a similar framework under Austrian law, when it came to breaches of EC law by the national legislature, the Austrian courts not only answered in the affirmative to the question of competence, but also clearly opted for an analogous application of the national framework on State liability for administrative breaches of domestic law to violations of Community law committed fully or in part by the national legislature.⁷³⁵ In contrast to the solution introduced in the United Kingdom in this context, where the *Factortame* litigation and the newly

⁷³³ FUNK, "Staatshaftung...", *supra* note 641, p. 556.

⁷³⁴ *Oberste Gerichtshof*, 30.01.2001, 1 Ob 80/00x: "[...] zählt die Staatshaftung der Mitgliedstaaten bei Verletzung des Gemeinschaftsrechts zu dessen fixem Bestand. Eine der wesentlichen Neuerungen ist die Haftung für legislatives Unrecht, und zwar für gemeinschaftswidrige Handlungen der Legislative, die bis zu diesem Zeitpunkt dem österreichischen Recht (Art. 23 B-VG, AHG) unbekannt war."

⁷³⁵ DOSSI, "Die gemeinschaftsrechtliche Staatshaftung...", *supra* note 725, pp. 28-29.

created Euro-tort also owe their existence to the absence of a suitable domestic cause of action for damages caused by the enactment of primary legislation,⁷³⁶ the silence of the Austrian legislature regarding the concept of State liability for legislative breaches was solved through the analogous application of the national liability regime for administrative breaches. This specific procedural avenue was used to ‘transplant’ the respective Community right into the domestic system of remedies.

In this way, the courts vowed to respect the conditions which had been set up by the CJEU in its case-law, namely the principle of equivalence and the principle of effectiveness.⁷³⁷ With explicit reference to the principle of primacy of Community law, the Regional Civil Court of Vienna underlined in one of its rulings that the national legal order had to be interpreted in such a way as to guarantee for the full enforcement of Community law. Consequently, the *AHG* would have to ensure the individual’s access to justice with respect to his/her claim of State liability for breaches of EC law.⁷³⁸ It was subsequently confirmed on appeal by the *Oberste Gerichtshof* that in the absence of a domestic law regulating the State’s liability for breaches incurred by the national legislature, the rules contained in the *AHG* should be applied accordingly, but only as far as the procedural and substantive regulations were in conformity with Community law.⁷³⁹ Otherwise, the total absence of a suitable national legal basis with respect to claims of State liability for breaches of

⁷³⁶ For details on *Factortame* and the development of the Euro-tort see chapter III, pp. 121 *et seq.*

⁷³⁷ See C-46 & 48/93, *Brasserie*, *supra* note 4, para. 67: “[...] the State must make reparation for the consequences of the loss and damage caused in accordance with the domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.”

⁷³⁸ *Landesgericht für Zivilrechtssachen Wien*, 19.11.1999, 33 Cg 28/96x-43: “Die innerstaatliche Rechtsordnung ist nämlich so auszulegen, dass dem Gemeinschaftsrecht zum Durchbruch verholfen werden kann. Daraus folgt, dass auch das Amtshaftungsgesetz so auszulegen ist, dass einem Geschädigten ein gerichtliches Verfahren über einen behaupteten Staatshaftungsanspruch offen steht.”

⁷³⁹ *Oberster Gerichtshof*, 25.07.2000, 1 Ob 146/00b: “Es entspricht herrschender Lehre, dass das AHG auf gemeinschaftsrechtliche Staatshaftungsansprüche auch im Falle legislativen Unrechts als Klagegrund mangels einer gesetzlichen Regelung über die näheren Voraussetzungen seiner Geltendmachung [...] analog anzuwenden ist, soweit seine prozessualen und materiellen Bestimmungen nicht Grundsätzen des Gemeinschaftsrechts widersprechen. [...] Fehlt es an einer nationalen gesetzlichen Regelung zur Umsetzung der Staatshaftung wegen Verletzung von Gemeinschaftsrecht, so dient dieses als unmittelbar anwendbare materiell-rechtliche Anspruchsgrundlage.”

Community law would lead to the direct application of the Community right as a self-standing cause of action under domestic law.⁷⁴⁰

b) Procedural aspects: questions of competence

While in Britain the procedural question of Crown liability with respect to administrative breaches of EC law had quickly been resolved, in Austria the basic process of identifying the national courts competent to rule on State liability claims for breaches of EC law by a public authority already stirred a considerable amount of controversy in the literature.⁷⁴¹ At the centre of the debate was the question of which procedural provisions to subsume such claims under. Generally speaking, there are two feasible legal bases under national law which could potentially regulate the procedural competence regarding State liability claims involving Community law.⁷⁴² The primary reference in this context is Article 9 of the *AHG*,⁷⁴³ which states that disputes concerning State liability for breaches of national law fall within the inherent jurisdiction of the courts of first instance in civil matters, i.e. the Austrian *Landesgerichte*. Considering the analogous applicability of the *AHG* for substantive issues concerning cases of State liability for breaches of Community law in Austria, the same legal basis could be applied for the regulation of the procedural questions involved. In that case, the national courts competent to rule on liability claims for breaches of national law by a public authority would be equally competent to decide

⁷⁴⁰ See also REBHAWN, "Staatshaftung...", *supra* note 148, pp. 758 *et seq.*

⁷⁴¹ See, *inter alia*, HELMUT KOZIOL, "Der Rechtsweg bei Staatshaftungsansprüchen, Gedanken eines Zivilrechtlers zum Beschluss des VfGH vom 6. März 2001, A 23/00 ua = ZfVB 2001/1922" (2001) *ZfV*, pp. 759 *et seq.*; DAMJANOVIC, "Zuständigkeit...", *supra* note 725, pp. 132 *et seq.*; REBHAWN, "Staatshaftung...", *supra* note 148, pp. 759 *et seq.*; KLAGIAN, "Die Staatshaftung...", *supra* note 683, pp. 19 *et seq.* and PETER SCHWARZENEGGER, "Zur Gerichtszuständigkeit in Staatshaftungssachen" (2002) *ZfRV*, pp. 185 *et seq.*

⁷⁴² DAMJANOVIC, "Zuständigkeit...", *supra* note 725, pp. 132 *et seq.*

⁷⁴³ Article 9(1) *AHG*: "Zur Entscheidung über die Klage des Geschädigten gegen den Rechtsträger auf Ersatz und des Rechtsträgers gegen das schuldtragende Organ auf Rückersatz ist in erster Instanz das mit der Ausübung der Gerichtsbarkeit in bürgerlichen Rechtssachen betraute Landesgericht [...] ausschließlich zuständig."

upon liability claims related to breaches of Community law. This solution has even been supported in the jurisprudence.⁷⁴⁴

However, part of the Austrian legal doctrine supported the view that decisions concerning State liability claims with a Community-law component ought to be subsumed under Article 137 of the *B-VG*.⁷⁴⁵ The constitutional provision of Article 137, which regulates the so-called ‘*Kausalgerichtsbarkeit*’ of the Austrian *VfGH* broadly addresses residual claims under public law, which fall outside the scope of the Public Tort Liability Act. As a consequence, matters related to State liability for breaches of EC law would fall under the exclusive competence of the Austrian Constitutional Court since according to Article 137, the Constitutional Court is competent to decide on all “pecuniary claims on the Federation, the *Länder*, the *Bezirke*, the municipalities and municipal associations which cannot be settled by ordinary legal process nor be liquidated by the ruling of an administrative authority.”⁷⁴⁶ Whereas similar claims under private law are subject to ordinary legal process, the majority of pecuniary claims based on public law against the State, the *Länder* or the communities are resolved by administrative decree. The Constitutional Court therefore only has residual jurisdiction in those cases, which fall outside the ambit of the ordinary judicial process. These cases constitute exceptions and are usually rather rare.⁷⁴⁷ Nevertheless, voices in the Austrian literature were supportive of the idea that State liability cases with a Community-law component constituted such an exception and therefore qualified for the application of Article 137 *B-VG*.

⁷⁴⁴ See *Oberlandesgericht Wien*, 14.03.2000, 14 R 14/00g and *Oberste Gerichtshof*, 22.10.1999, 1 Ob 80/99t. In the latter ruling the *OGH* silently assumed its competence to rule on these questions. In favour of such a regulation, *inter alia*, SUTTER, “Die Verjährung...,” *supra* note 644, p. 344; REBHAIN, “Staatshaftung...,” *supra* note 148, p. 759 and DOSSI, “EU-Staatshaftung in Österreich...,” *supra* note 675, p. 342. In this context see also HANS KLECATSKY and SIEGBERT MORSCHER, *Das österreichische Bundesverfassungsrecht*, 3rd ed. (Vienna, Manz, 1982), pp. 311-312; SCHOIBWOHL, *Staatshaftung*, *supra* note 651, p. 228; WILFRIED DOBROWZ, “Rechtssache Köbler - Neues zur Staatshaftung in Österreich” (2003) 17 *Wirtschaftsrechtliche Blätter* 12, p. 569,

⁷⁴⁵ See, for example, LUDWIG ADAMOVICH *et al.*, *Österreichisches Staatsrecht I* (Vienna, Springer, 1998), para. 17.083; DAMJANOVIC, “Zuständigkeit...,” *supra* note 725, p. 137.

⁷⁴⁶ Article 137 *B-VG*: “*Der Verfassungsgerichtshof erkennt über vermögensrechtliche Ansprüche an den Bund, die Länder, die Bezirke, die Gemeinden und Gemeindeverbände, die weder im ordentlichen Rechtsweg auszutragen, noch durch Bescheid einer Verwaltungsbehörde zu erledigen sind.*” Translation as in FUNK, “Staatshaftung...,” *supra* note 641, p. 556.

⁷⁴⁷ KURT HELLER, *Outline of Austrian Constitutional Law* (Boston, Deventer, 1989), p. 20.

Therefore the Constitutional Court would be given jurisdiction to rule in all Community-related cases concerning the liability of the Austrian State.⁷⁴⁸

An important decision by the Austrian Constitutional Court in 2001 eventually silenced this controversy in the academic literature. The so-called '*Brenner Maut*'-decision by the Constitutional Court on 6 March 2001 seemed to finally settle the issue.⁷⁴⁹ The Court's decision essentially reiterated the CJEU's earlier declaration that in light of the principle of national procedural autonomy, the question of competence had to be decided according to national procedural rules. Thereafter, the Constitutional Court conclusively renounced its own competence to rule in such cases and instead explicitly confirmed the general competence of the courts of first instance in civil and commercial matters.⁷⁵⁰ Nevertheless, the Court singled out two exceptions to the general rule of competence. First, the Court seemingly left unresolved the question of competence concerning breaches of Community law by one of the national superior courts.⁷⁵¹ Secondly, the Court declared that it would assert competence in the cases of legislative breaches of EC law. Thus it established that only in cases when individuals claimed damages for violations of EC law committed by the national legislature, would the proceedings be conducted according to Article 137 B-VG. The latter proclamation triggered fierce reactions in the literature by those who favoured the overall competence of the ordinary courts also in instances when the breach of EC law had been committed by the national legislature.⁷⁵² In sum, with this decision the Constitutional Court basically confirmed that not only the substantive, but also the procedural rules of the *Amtshaftungsgesetz*, would apply to State liability claims based on breaches of Community law. According to section 9(1) of the *AHG*,

⁷⁴⁸ See, *inter alia*, ADAMOVICH *et al.*, *Staatsrecht I*, *supra* note 745, Rz 17.083.

⁷⁴⁹ Briefly put, the case evolved around several transport companies which sued the Austrian State for damages on the basis of the amount of toll rates charged on the Brenner motorway, which were contrary to Community law. See VfGH, A-23/00 *et al.*, *supra* note 732. In this context see also DAMJANOVIC, "Zuständigkeit...", *supra* note 725, pp. 133 *et seq.*

⁷⁵⁰ The original wording of the final judgment by the VfGH was as follows: "*Immer dann [...], wenn der Kläger seinen Anspruch auf eine Verletzung des Gemeinschaftsrechts stützt, die er der Vollziehung zurechnet, so sind grundsätzlich [...] die Amtshaftungsgerichte zuständig.*" VfGH, A-23/00 *et al.*, *supra* note 732.

⁷⁵¹ We will return to this question at a later point in this chapter.

⁷⁵² For a detailed analysis on this question see DAMJANOVIC, "Zuständigkeit...", *supra* note 725, pp. 132-145. See also SCHWARZENEGGER, "Die Subsidiarität...", *supra* note 148, pp. 185 *et seq.*

both types of claim, whether with a domestic law origin or a Community law component, are therefore inherent to the jurisdiction of the national courts of first instance in civil and commercial matters.

Controversy persisted, however, over the procedural question as to which court was competent to decide on liability claims for legislative breaches of EC law. While the *Oberste Gerichtshof* had already claimed competence to rule on cases of State liability for breaches of Community law committed not only by the executive, but also by the national legislature,⁷⁵³ the Constitutional Court subsequently adopted a rather different stance in its decision of 6 March 2001.⁷⁵⁴ In its most recent jurisprudence, the Constitutional Court reiterated the line of reasoning that it had previously established in 2001. In a decision of 10 October 2003, which was pronounced only a week after *Köbler*, the Constitutional Court confirmed its initial opinion on the question of competence, namely that as a rule, State liability claims for violations of Community law were to fall within the jurisdiction of the courts of first instance in civil and commercial matters.⁷⁵⁵ However, it also insisted that the competence of the ordinary courts to rule on such issues was strictly limited to instances of liability claims against the State based on harm caused by those public authorities, which fell under the definition of Article 23(1) *B-VG*. For liability claims, however, which were based on breaches of Community law by the national legislature, the Constitutional Court re-confirmed the application of Article 137 *B-VG*.⁷⁵⁶ As the reader will recall, Article 137 of the Austrian Constitution attributes competence to the Constitutional Court itself for those pecuniary claims on the Federation, the *Länder*, the *Bezirke*, the municipalities and municipal associations, which cannot be settled by ordinary legal process nor be liquidated by decree of an administrative authority.⁷⁵⁷

⁷⁵³ *OGH*, 1 Ob 146/00b, *supra* note 739.

⁷⁵⁴ *VfGH*, A-23/00 *et al.*, *supra* note 732.

⁷⁵⁵ *VfGH*, A-36/00, *supra* note 640.

⁷⁵⁶ Critical on this point SCHWARZENEGGER, "Gerichtszuständigkeit...", *supra* note 741, pp. 185-190 as well as KLAGIAN, "Die Staatshaftung...", *supra* note 683, pp. 20 *et seq.* On the problems of delimitation between the two areas of competence see KOZIOL, "Der Rechtsweg...", *supra* note 741, pp. 759 *et seq.* and DOSSI, "Die gemeinschaftsrechtliche Staatshaftung...", *supra* note 725, pp. 32 *et seq.*

⁷⁵⁷ Article 137 *B-VG* speaks about "Kausalgerichtsbarkeit", i.e. the residual competence of the Austrian Constitutional Court.

In sum, as mirrored in the case-law, the position adopted by the *Verfassungsgerichtshof* in its jurisprudence on the matter and the stance taken by the *Oberste Gerichtshof* on the same question remain in contradiction to each other. The contentious point is that both courts claim to be competent to rule in cases of State liability for breaches of Community law by the national legislature. Moreover, the question of competence concerning judicial breaches of EC law also remained unresolved. When a large constitutional reform project, the so-called ‘*Österreich Konvent*’ (the Austrian Constitutional Convention) took up its work in Austria in June 2003, also the disputed questions of competence in State liability proceedings were addressed in the course of the debate. The Convention⁷⁵⁸ was an official reform commission consisting of high-level experts, judges, lawyers, academics as well as political representatives from the governing parties and the opposition, which were divided into ten topic-specific Working Groups devising proposals for a substantial reform of the Austrian Constitution.⁷⁵⁹ In the course of the deliberations in Working Group IX, “Legal Protection and the Judiciary”, consensus could be achieved on the question of competence in State liability proceedings for breaches of EC law by the national legislature. As noted in the Convention’s final report of 28 January 2005, jurisdiction in such cases is to be awarded to the Constitutional Court on the basis of Article 137 *B-VG*.⁷⁶⁰ However, so far the legislature has not introduced any changes in the wording of Article 137 *B-VG*. Furthermore, the proposal to proceed with an express constitutional amendment regulating cases of State liability for breaches of European Community law was eventually rejected by the Convention.⁷⁶¹

⁷⁵⁸ For a list of members of the founding committee see www.konvent.gv.at/K/EN/INFO/FC/FoundingCommittee_Portal.shtml.

⁷⁵⁹ For more detailed information on the composition and the goals of the Convention, see the official website at www.konvent.gv.at; parts of the website are also available in English at www.konvent.gv.at/K/EN/Welcome_Portal.shtml.

⁷⁶⁰ ‘*Österreich-Konvent*’, *Endbericht* [1/ENDB-K]: *Teil III - Beratungsergebnisse* (31.01.2005); a full-text version (in German) of the final report of the Austrian Constitutional Convention can be accessed under www.konvent.gv.at/K/DE/ENDB-K/ENDB-K_00001/pmh.shtml. Thereby, see especially Part III, results of Working Group IX, “Legal Protection and the Judiciary”, pp. 220 *et seq.*

⁷⁶¹ We will return to this question in the next section of this chapter.

II. The Austrian Regime of State Liability after Köbler

*Es fällt doch ein Schatten
auf die weiße unbefleckte
Weste der anderen
Höchstgerichte.*⁷⁶²

Köbler had significant and unparalleled consequences for the prevailing system of State liability for judicial breaches in Austria. The early judgments of the CJEU's case-line with respect to the question of State liability for breaches of Community law, namely the rulings in cases such as *Francovich*,⁷⁶³ *Wagner Miret*,⁷⁶⁴ and *Faccini Dori*,⁷⁶⁵ had been delivered before Austria's accession to the EU on 1 January 1995. However, EU accession certainly entailed the full recognition of the *acquis communautaire* and the need for Austria to ensure the full application of the Community law principles, such as the principle of Member State liability for breaches of Community law. Soon after Austria's accession, the CJEU ruled in the cases of *Konle*⁷⁶⁶ and *Rechberger*,⁷⁶⁷ both of which were references for preliminary rulings according to Article 234 EC by Austrian courts, the *Landesgericht für Zivilrechtssachen Wien* and the *Landesgericht Linz* respectively, concerning, *inter alia*, the application of the *Francovich* liability. This also implied the full recognition of the concept of State liability for those acts or omissions by the national legislature, which were in violation of Community law. This principle and the individual's right attached to it had to be fully protected under Austrian law, despite the fact that a similar remedy did not exist under national law with respect to domestic claims. Nevertheless, as we have just seen, such a possibility has been granted to individuals

⁷⁶² Loosely translated as "A dark shadow has fallen on the other superior courts." Horst Schlosser, former Vice-President of the *OGH* and former President of the Supreme Liability Chamber (*Amtshaftungssenat*) commenting on the CJEU's *Köbler* ruling. See 'Staatshaftung' - Tagung der Österreichischen Juristenkommission am 28. Oktober 2003 in Wien (Wien/Graz, Neuer Wissenschaftlicher Verlag, 2004), p. 45.

⁷⁶³ C-6 & 9/90, *Francovich*, *supra* note 2, paras 1 *et seq.*

⁷⁶⁴ C-334/92, *Wagner Miret*, *supra* note 83, paras 1 *et seq.*

⁷⁶⁵ C-91/92, *Paola Faccini Dori*, *supra* note 84, paras 1 *et seq.*

⁷⁶⁶ C-302/97, *Konle*, *supra* note 7, paras 1 *et seq.*

⁷⁶⁷ C-140/97, *Rechberger*, *supra* note 99, paras 1 *et seq.*

in Austria who attempt to obtain reparation for damage inferred by a violation of Community law through an act or omission of the legislative authorities.

New legal challenges of course arose after *Köbler*.⁷⁶⁸ With the explicit acknowledgment of the principle of Member State liability for breaches of Community law committed by the judicial organs of a State, the Austrian legal order was faced with an inevitable clash between the general Community-law maxim as it had been established by the CJEU *Köbler* and the constitutionally-anchored principle which excluded all acts or decisions by one of the three Austrian superior courts entirely from the ambit of State liability.⁷⁶⁹ While the national system remained fully applicable in cases that were purely concerned with the State's liability for breaches of domestic law, a more intricate situation emerged in relation to the extended *Francovich*-doctrine and its application under national law in Austria according to the principle of national procedural autonomy. The analysis of this delicate situation under Austrian law and the viability of the solutions proposed to resolve it, are at the core of the analysis set out in the forthcoming section.

1. Possible implications and necessary institutional adjustments in the light of *Köbler*

The fact that in a number of Member States, such as Austria, Greece, Ireland and the UK, the concept of State liability for wrongful judicial acts is, contrary to the impression conveyed in Advocate General Léger's Opinion in the *Köbler* case,⁷⁷⁰ either heavily restricted or entirely excluded under domestic law, did not prevent the CJEU from introducing such a principle for the purposes of Community law. Naturally, the newfound Community principle will not remain unnoticed by the Member States as it is their utmost duty under Community law to ensure that those rules take full effect and to protect the rights they confer upon individuals.⁷⁷¹ While some Member States so far have nevertheless successfully managed to ignore the

⁷⁶⁸ C-224/01, *Köbler*, *supra* note 1, paras. 1 *et seq.*

⁷⁶⁹ Article 23(1) of the Federal Constitution in combination with Article 2(3) *AHG*.

⁷⁷⁰ Opinion, Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, paras. 77-85.

⁷⁷¹ Case 106/77, *Simmenthal*, *supra* note 396, paras. 1 *et seq.*

Köbler case in part due to the absence of individual applications of such sort, Austria was directly affected by the *Köbler* judgment and was therefore immediately urged to consider the possible ramifications and the necessary institutional adjustments created by the ruling. This also implied that the validity of Article 2(3) of the *AHG* had to be re-assessed in the light of Community law.⁷⁷²

In Sweden, a country which, as we have seen, shares most of the characteristics of the Austrian State liability regime, the *Köbler* case also brought about similar considerations. Nevertheless, it appears that Sweden had already become increasingly attentive to the demands of Community law long before *Köbler*. Already in 1997 an official report had explored the compatibility of the Swedish framework of non-contractual liability of the State and the local authorities with the concept of State liability for judicial breaches under Community law. The report had been commissioned by the Swedish Government at the time of Sweden's accession to the EU in 1995 and was subsequently commissioned by a special Commission of Inquiry. The study was focus on a comparison of the Swedish State liability regime with the CJEU's criteria established under *Francovich*.⁷⁷³ The report clearly stated that the limitations contained in Chapter 3 Section 7 of the Swedish Tort Liability Act⁷⁷⁴ were incompatible with the CJEU's case-law, which required that also Acts of Parliament as well as rulings of the Swedish Supreme Courts must be subject to the Community's rules on State liability as established in the *Francovich* case-law. Furthermore, the report argued that in a case with Community law relevance, Chapter 3 Section 7 of the Swedish Tort Liability Act would need to be set aside as it rendered impossible the exercise of an individual's right under Community law. The Commission recommended repealing Chapter 3 Section 7 altogether.⁷⁷⁵

⁷⁷² MARTEN BREUER, "Staatshaftung für Judikativunrecht vor dem EuGH" (2003) 134 *Bayrische Verwaltungsblätter* 19, p. 587; DOBROWZ, "Rechtssache *Köbler*...", *supra* note 744, p. 569. See also SCHOBWOHL, *Staatshaftung*, *supra* note 651, pp. 217 *et seq.*

⁷⁷³ *SOU 1997:194 Det allmännas skadeståndsansvar vid överträdelse av EG-regler*. A summary in English is provided on pp. 17-21.

⁷⁷⁴ As noted before, Chapter 3 Section 7 of the Swedish Tort Liability Act exempts acts of the Government (*Regeringen*), the Swedish Parliament (*Riksdagen*) and the two Supreme Courts (*Högsta domstolen* and *Regeringsrätten*) from the general scheme of State liability.

⁷⁷⁵ *SOU 1997:194*, pp. 145-149.

The report did not in the end lead to any immediate legislative changes. However, what is remarkable in this context is that long before the *Köbler* ruling the Commission of Inquiry already treated it as self-evident that the acts and omissions of courts could give rise to State liability under Community law. This shows a remarkably progressive attitude by the Swedish authorities towards individual rights' protection under Community law even as early as 1997.

a) An explicit constitutional framework provision for cases of State liability with Community law relevance in Austria?

The immediate reactions to the *Köbler* case in Austria can also be partly explained by the fact that just at the time of the *Köbler* ruling in September 2003 the 'Österreich-Konvent'⁷⁷⁶ was in session in Austria. As noted before, the Austrian Constitutional Convention constituted a special reform body in Austria, which was put to work in June 2003 with the objective of drawing up reform proposals for a substantial overhaul of the Austrian Constitution.⁷⁷⁷ Modelled after the European Constitutional Convention, the 'Österreich Konvent' included ten different Working Groups, each focusing on different subject areas and working towards a draft of a revised and recodified version of the *Bundes-Verfassungsgesetz*, the Austrian Constitution.⁷⁷⁸ In the course of the deliberations in Working Group IX of the *Konvent*, which dealt with a broad array of issues related to the judiciary in Austria, an important point of discussion and intense reflection was *inter alia* the future inter-relationship of the three superior courts in Austria and the question of how to preserve the constitutional maxim of absolute parity between the *OGH*, the *VwGH* and the *VfGH*. This particular debate naturally also addressed some of the unresolved issues

⁷⁷⁶ The Austrian Constitutional Convention; detailed information on the composition and the goals of the 'Österreich-Konvent' is available on the official website at www.konvent.gv.at.

⁷⁷⁷ A full-text version (in German) of the final report of the Austrian Constitutional Convention can be accessed at www.konvent.gv.at/K/DE/ENDB-K/ENDB-K_00001/pmh.shtml. Thereby, see especially Part III, results of Working Group IX, "Legal Protection and the Judiciary", pp. 199-221.

⁷⁷⁸ The Austrian Constitutional Convention started its work on the far-reaching reform proposal of the Austrian Constitution on 30 June 2003. At the beginning of 2005, after about 19 months of work, the *Konvent* completed its project without having reached a consensual agreement on a revised proposal of the Austrian Constitution. Only the areas where consensus was achieved have since partly been implemented under Austrian law. For detailed information and full access to documents see www.konvent.gv.at.

regarding the compatibility of the Austrian regime of State liability with the requirements set under Community law in light of the principle of national procedural autonomy.⁷⁷⁹

In the Convention's final report, which compiled all the conclusions reached in the different Working Groups, Working Group IX expressly underlined that Article 2(3) *AHG*, the principle of immunity of the three superior courts, would be inapplicable with respect to public liability claims based on breaches of Community law.⁷⁸⁰ However, despite this exception in cases of State liability *à la Köbler*, the report concluded that the immunity of the three superior courts would not otherwise be affected.⁷⁸¹ Moreover, the final report highlighted the complete absence under domestic law of an explicit legal framework regulating the general procedural and substantive questions related to the principle of Member State liability for breaches of Community law.⁷⁸² In light of the principle of legal certainty,⁷⁸³ Working Group IX thereafter discussed the implementation of separate legal provisions within the Austrian Constitution, which would specifically regulate the issue of State liability for breaches of Community law embracing all three branches of the State. After all, the principle of legal certainty demanded that within the domestic legal order every individual should have at least the right to know with utmost certainty to which court he or she should address a specific claim.

⁷⁷⁹ Constitutional Convention, Report of the meeting of 13 February 2004, Working Group IX, point VI (2). For a more detailed account of the debate see also the detailed protocol of the meeting of 12 February 2004, Working Group IX, pp. 6 *et seq.* Both documents are available at www.konvent.gv.at/K/M_1/BAUS/REG-K/K.shtml.

⁷⁸⁰ Explicitly confirmed in *VfGH*, A-36/00, *supra* note 640. Contrary to the predictions made by Kurt Hofmann, former Vice-President of the *OGH*, in 2002; see HOFMANN, "Haftung...", *supra* note 718, p. 156. On this question see also GABRIELE KUCSKO-STADLMAYER, "Voraussetzungen der Staatshaftung", 'Staatshaftung' - Tagung der Österreichischen Juristenkommission am 28. Oktober 2003 in Wien (Wien/Graz, NWV, 2004), pp. 13 *et seq.*; KLAGIAN, "Die Staatshaftung...", *supra* note 683, p. 22; REBHACH, "Staatshaftung...", *supra* note 148, p. 760 and DOBROWZ, "Rechtssache Köbler...", *supra* note 744, pp. 569-570.

⁷⁸¹ In a recent judgment of 5 June 2007 the *OGH* in fact re-confirmed the full applicability of Article 2 (3) *AHG* under national law by stating that: "Außerhalb des Gemeinschaftsrechts fehlt es aber für die Gewährung von Amtshaftungsansprüchen aus (fehlerhaften) höchstgerichtlichen Entscheidungen an jedweder Haftungsgrundlage." See *Oberste Gerichtshof*, 05.06.2007, 1 Ob 36/07m.

⁷⁸² *Österreich-Konvent, Endbericht*, *supra* note 760, pp. 220 *et seq.*

⁷⁸³ Interestingly enough, the Austrian government used exact same principle in its submission in the *Köbler* proceedings as an argument to oppose the concept of State liability for erroneous decisions of courts of last instance. See C-224/01, *Köbler*, *supra* note 1, paras. 20 *et seq.*

However, arguments were also advanced against the introduction of additional constitutional provisions in this context. A large group of the Committee of Experts considered it premature to proceed towards a final constitutional codification of an issue, which still had not been conclusively regulated in the jurisprudence of the CJEU. In light of the dynamic developments on the Community level in the field of State liability and the uncertainties, which persisted within the relatively young jurisprudence of the CJEU on this question, the Working Group finally agreed that it was not advisable to prejudge the issue.⁷⁸⁴ Therefore, it was recommended that Community-related claims for liability of the State simply had to be subsumed under the provisions of the *AHG*. However, even if one might agree that a comprehensive normative regulation of the question of Member State liability might not be feasible under national law, it nevertheless seems almost indispensable in the Austrian case as a means to find a quick, coherent and definite solution under domestic law with respect to the unresolved procedural questions of competence, which are still not entirely resolved today.⁷⁸⁵

b) Structural deficiencies: *quis iudicabit?*

The State's liability for breaches of EC law by one of the superior courts not only raises questions of competence, but also creates serious procedural difficulties under Austrian law. Whereas Article 9(4) of the *AHG*, which would also be applicable in cases with Community-law relevance, will prevent a situation whereby the same court would be charged to rule on a liability claim based on its own judgment,⁷⁸⁶ the procedural stalemate appears to be unavoidable at the country's highest level of courts. State liability proceedings inferred by a judgment of one of the three superior courts in Austria would provoke not only serious procedural difficulties, but could also lead to a violation of the constitutional principle of parity between the three

⁷⁸⁴ *Österreich-Konvent, Endbericht*, *supra* note 760, pp. 220 *et seq.* See also Protocol of the meeting of 12 February 2004, Working Group IX, pp. 31 *et seq.*

⁷⁸⁵ In a similar manner, DOSSI, "Die gemeinschaftsrechtliche Staatshaftung...", *supra* note 725, pp. 35-36.

⁷⁸⁶ As noted earlier, Article 9(4) *AHG* provides a special mechanism of derogation for those cases when liability proceedings encounter procedural entanglements in front of the first or second instance courts.

courts.⁷⁸⁷ This would be the case whenever the ‘Supreme Liability Chamber’ (the *Amtshaftungssenat*)⁷⁸⁸ of the *OGH*, which generally constitutes the last instance in State liability proceedings under national law, ruled in final instance in cases of State liability claims for harm caused by a judgment of one of the superior courts. Moreover, it could even lead to a situation whereby the *OGH* would be charged to decide on a State liability claim for harm caused by one of its own judgments, which would then result in the *OGH* acting as “judge in its own cause”. In light of all the aforesaid, the division of competences as regulated under national law would elevate the *Amtshaftungssenat* of the *OGH* to the highest court in the country.⁷⁸⁹

Due to the absence of an explicit normative basis under domestic law, the procedural competences in State liability proceedings with a Community-law component in Austria still remain shrouded in uncertainty. Furthermore, despite conflicting national jurisprudence and ongoing discussions in the literature, there has so far been no initiative from the legislature to resolve once and for all the contended question of which national court should be competent to rule on breaches of Community law inferred by the judiciary, especially in those cases where the damage has been caused by one of the superior courts. In a prominent decision of 2001,⁷⁹⁰ the Constitutional Court had declared that it was competent to rule in cases of State liability for legislative breaches of EC law. In this well-known ‘*Brenner-Maut*’ decision, which has already been discussed in the previous sections of this chapter, the Court not only claimed to be competent to rule on public liability claims for legislative breaches of Community law, but also seemed to imply to be the responsible court in cases when the breach of EC law had been caused by one of the other superior courts.⁷⁹¹ The Constitutional Court had in fact very carefully chosen

⁷⁸⁷ FUNK, "Staatshaftung...", *supra* note 641, p. 556.

⁷⁸⁸ *Amtshaftungssenat des OGH (1. Senat des OGH als Fachsenat für Rechtssachen, die Fragen der Amtshaftung und damit zusammenhängende Ersatzansprüche betreffen)*.

⁷⁸⁹ In this context Dobrowz speaks of the constitutional breach of creating a ‘*höchstes Höchstgericht*’. DOBROWZ, "Rechtssache Köbler...", *supra* note 744, p. 570. In a similar vein, REBHAHN, "Staatshaftung...", *supra* note 148, p. 760; DOSSI, "Die gemeinschaftsrechtliche Staatshaftung...", *supra* note 725, pp. 38 *et seq*; KLAGIAN, "Die Staatshaftung...", *supra* note 683, p. 22;

⁷⁹⁰ *VfGH, A-23/00 et al.*, *supra* note 732.

⁷⁹¹ *Ibid.*

the wording of its decision on that particular point. After confirming that it was in the ordinary courts' competence to rule on State liability claims for administrative breaches of EC law, the Court added that "*anderes mag in Ansehung des § 2 Abs 3 AHG iVm Art. 137 B-VG gelten*," which could be loosely translated as 'a different solution might have to be applied with respect to Article 2(3) AHG in combination with Article 137 of the Austrian Constitution.'⁷⁹²

However, by drawing the connection between the national exemptions to State liability claims in Article 2(3) of the *AHG* on the one hand, and Article 137 *B-VG*, which refers to the residual jurisdiction of the Constitutional Court in cases that fall outside the scope of the *Amtshaftungsgesetz*, on the other, the Court's intention in this particular decision seemed to be rather evident. Briefly put, in an implicit manner the Court also claimed to be competent in such cases.⁷⁹³

A clear confirmation of the Court's '*Brenner-Maut*' decision actually followed soon after in a further judgment by the Constitutional Court of 10 October 2003,⁷⁹⁴ which was pronounced only two weeks after *Köbler*. This case is also rather interesting from a substantive perspective because the Court already applied the conditions set forth by the CJEU in *Köbler* to test whether the Supreme Administrative Court, the *Verwaltungsgerichtshof* (*VwGH*), had committed a manifest breach of EC law in a previous decision. However, the Court eventually ruled out a violation of Community law by the *VwGH* in this specific case.⁷⁹⁵ Nevertheless, it is probably safe to say that the Austrian Constitutional Court became the first court in the EU to apply the *Köbler* conditions only two weeks after *Köbler* itself.

The case concerned a State liability claim by an individual who had allegedly been harmed by a procedural cost decision issued by the *VwGH*. Briefly put, in this case the *VwGH* had denied the claimant the full restitution of the procedural costs,

⁷⁹² Ibid.

⁷⁹³ Cf. SUTTER, "Die Verjährung...", *supra* note 644, pp. 348 *et seq.*

⁷⁹⁴ *VfGH*, A-36/00, *supra* note 640.

⁷⁹⁵ Ibid.

which had been accumulated in the course of a preliminary rulings procedure before the CJEU. Without entering into the factual details of the case at this point, as far as the procedural competence is concerned the ruling also contained an affirmative reference to the Court's previous decision on the question in the '*Brenner-Maut*' case. In fact, this time the Constitutional Court emphatically proclaimed that Article 2(3) of the *AHG* was based on the *telos* that the ordinary courts, which were competent to rule according to the *AHG*, were not empowered to examine the legality of a superior court's decision, not even in an implicit manner in the course of State liability proceedings.⁷⁹⁶ Furthermore, the Court stated that in light of the fact that the principle of primacy of EC law would preclude the application of Article 2(3) of the *AHG* in cases with a Community-law component, the procedural questions attached to this issue were to be resolved following a separate procedural path available under domestic law in Austria. *In concreto*, the Court was referring to Article 137 *B-VG*, which serves as the residual legal basis for cases that cannot be subsumed under the provisions of the *AHG*. According to the *VfGH*, Article 137 would therefore apply in cases of State liability for breaches of Community law incurred by the national legislature or by a decision of a superior court.

The question of competence regarding liability claims for breaches of EC law by the national superior courts was also discussed in the course of the deliberations in the Austrian Constitutional Convention, but even there no consensus could be reached on this question. Instead, the debate in Working Group IX directly referred to the jurisprudence of the Constitutional Court in the "*Brenner-ruling*"⁷⁹⁷ and suggested the application of Article 137 *B-VG* in this context.⁷⁹⁸ With respect to the question of codification, the Working Group had previously concluded that there was no need for

⁷⁹⁶ Ibid: "[...] dass die Amtshaftungsgerichte nicht berechtigt sein sollen, Entscheidungen der [...] Höchstgerichte auf ihre Rechtmäßigkeit zu überprüfen." and "Für die Geltendmachung von Staatshaftungsansprüchen nach fehlerhaften Entscheidungen der Höchstgerichte und nach gesetzgeberischer Untätigkeit bietet sich in der Tat die Klage nach Art 137 B-VG [...] an."

⁷⁹⁷ *VfGH*, A-23/00 *et al.*, *supra* note 732. See also KUCSKO-STADLMAYER, "Voraussetzungen...", *supra* note 780, pp. 14 *et seq.*

⁷⁹⁸ For a report on this particular debate see Austrian Constitutional Convention, Working Group IX, Protocol of the Meeting of 12 February 2004, pp. 5-7; available at www.konvent.gv.at/K/M_I/BAUS/REG-K/K.shtml.

the creation of an explicit constitutional amendment on the matter.⁷⁹⁹ Moreover, the Working Group also failed to propose a solution to the intricate case-scenario whereby a State liability claim could arise even for an erroneous decision of the Constitutional Court itself. Which court would in this case be competent to decide upon such a claim? According to the principle of '*nemo iudex in res sua*', Article 137 B-VG could certainly not apply as it would lead to an indirect revision by the Constitutional Court of its own ruling in the case. Furthermore, judgments by the Constitutional Court on questions of State liability for breaches of EC law by either the *OGH* or the Supreme Administrative Court could theoretically be the subject of yet another liability claim, which would create the problem of infinite regression. All these aspects were not addressed in the course of the deliberations of the Austrian Constitutional Convention and have, in fact, not been exhaustively discussed in the literature. Thus, for the moment a solution to this intricate problem is not immediately available under Austrian law.

c) The rebirth of the '*Austrägalssenat*'?

In an attempt to respect the constitutionally-guaranteed parity of the three superior courts and to find a rather quick and simple solution to the problem, the *constitutione ferenda* has toyed with the idea of introducing a special 'Liability-Senate' to rule on State liability claims for breaches of EC law in such cases.⁸⁰⁰ The idea behind this proposal is that the 'Liability-Senate' would be responsible to decide on State liability claims based on decisions of the three superior courts. The effect of the creation of an additional superior instance to rule on such claims, it was argued, would be twofold. Not only would it free lower courts from the burden of having to rule on State liability claims based on decisions by a court of last instance, but it would also maintain the balance and parity between the three superior courts as none

⁷⁹⁹ Ibid, p. 7.

⁸⁰⁰ See *Österreich-Konvent*, Working Group IX, Report, 12 February 2004, p. 32; available at www.konvent.gv.at/K/M_I/BAUS/REG-K/K.shtml.

of them would have the power to rule on State liability claims brought about by decisions of one of the others.⁸⁰¹

According to several similar proposals the special Senate competent to decide on State liability claims based on erroneous decisions of the superior courts could in fact be modelled on a similar institution, which existed in Austria between 1867 and 1918, but was subsequently abandoned in the course of the Kelsenian reform of the Austrian Constitution, the *Austrägalssenat*.⁸⁰² This special ‘Liability-Senate’ was created in Austria in 1867 to decide on conflicts of competence between the Administrative Court and the Constitutional Court, which before 1918 was called the *Reichsgericht*. The *Austrägalssenat* consisted of four ad-hoc members from each of the (then) two Supreme Courts and met once a year under the chairmanship of the President of the Supreme Court of Justice or his deputy.⁸⁰³ Recent academic comments have suggested that a renewed ‘Liability-Senate’ would strongly resemble the features of the old *Austrägalssenat*. Concerning the composition of the special Senate, the idea is apparently to have three representatives from each of the three superior courts with a rotating chairmanship.⁸⁰⁴ Similarly composed institutions serving, *inter alia*, the purpose of solving conflicts between the highest courts of equal rank have been established and are still in use in certain Member States. In France, as we will see in the following chapter, we can find a comparable body in the *Tribunal des Conflits*. In Germany we encounter a similar institution in the *Gemeinsamer Senat der obersten Bundesgerichte*⁸⁰⁵ and in Greece, the *Anotato Eidiko Dikastirio*, which is

⁸⁰¹ For discussions in the literature on the *Austrägalssenat*, see, for example, DOBROWZ, "Rechtssache Köbler...", *supra* note 744, pp. 570 *et seq.* and KUCSKO-STADLMAYER, "Voraussetzungen...", *supra* note 780, p. 15. Reference to the *Austrägalssenat* was also made in the course of the conference *Tagung ÖJ: Staatshaftung*, *supra* note 762, pp. 44-45.

⁸⁰² *Reichsgesetzblatt (RGBl)* 37/1876 vom 22.10.1875; § 2 *des Gesetzes vom 25.01.1919 über die Errichtung eines deutschösterreichischen Verfassungsgerichtshofes*, *StGBI* 1919/48. In this context see KUCSKO-STADLMAYER, "Voraussetzungen...", *supra* note 780, p. 15, FN 53.

⁸⁰³ GEORG SCHMITZ, "The Constitutional Court of the Republic of Austria 1818-1920" (2003) 16 *Ratio Juris* 2, p. 257.

⁸⁰⁴ See legislative proposal on the implementation of a so-called ‘Common Senate’ (*Gemeinsamer Senat*) in *Österreich-Konvent*, Working Group IX, Report, 28 October 2004; available at www.konvent.gv.at/K/DE/AVORL-K/AVORL-K_00628/fname_029244.pdf.

⁸⁰⁵ Joint Chamber of the Highest Federal Courts. See *Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes (RsprEinhG) vom 19. Juni 1968 - BGBl. I S. 661*.

composed of judges from the various highest courts in the country, also exercises a similar function.⁸⁰⁶

However, while the creation of the special Senate in Austria might at first glance tackle the problem, the implementation of an additional instance in State liability proceedings would eventually constitute not more than a mere postponement of the pressing questions at stake. What are the limits of State liability for judicial breaches? Could a decision of a body like the *Austrägalssenat* not in itself constitute the basis of a liability claim? Are we faced with a never-ending chain of liability claims and indefinite question-marks over the basic guarantee of legal certainty? These and other questions will be addressed in the forthcoming chapters.

⁸⁰⁶ TSATSOS, "Haftung...Griechenland," *supra* note 547, pp. 187 *et seq.*

State Liability for Judicial Breaches limited by the Nature of the Judicial Act

With the case of Austria we have looked at a national system that shares the pertinent characteristics of those countries belonging to group II of our classificatory scheme. Furthermore, based on the sub-groups we have created at the beginning of this chapter, the Austrian State liability regime typifies those countries falling under sub-group I.⁸⁰⁷ As the reader will recall, all the countries adhering to group II impose restrictions on the invocation of State liability for judicial breaches either with respect to acts performed by specific courts (*source*) and/or with respect to specific predefined acts performed by any court or court organ within the national judicial hierarchy (*nature*). This additional distinction has allowed us to create sub-groups even within our general group II. While this chapter has already highlighted some of the classic features of the State liability regimes shared by other Member States in sub-group I, we would nevertheless like to add a short synopsis of those systems of State liability falling under sub-group II of our taxonomy. In a nutshell, these are the Member States where the principle of State liability for judicial breaches is limited by the nature of the judicial act. We are therefore concerned with countries featuring State liability frameworks of an inclusive or negative nature.⁸⁰⁸ Countries adhering to the second sub-group of our group II are, for example, Germany, Slovenia and Italy.⁸⁰⁹ Since the CJEU has only recently issued a significant ruling concerning Italy in this context,⁸¹⁰ we will seize the opportunity to have a brief look at the Italian system of State liability for judicial breaches in the following paragraphs.⁸¹¹

⁸⁰⁷ Sub-group I contains those Member States imposing limits to their system of State liability for judicial breaches on the basis of the court which has caused the violation.

⁸⁰⁸ For the distinction between systems of an exclusive (positive) nature and those of an inclusive (negative) nature see introduction to this chapter.

⁸⁰⁹ See graph on p. 227.

⁸¹⁰ C-173/03, *Traghetti*, *supra* note 134, see also the earlier judgment in C-129/00, *Commission v. Italy*, *supra* note 510, para. 1 *et seq.*

⁸¹¹ On the application of the *Francovich*-doctrine under Italian law see ANGELA SICILIANO, "State Liability for Breaches of Community Law and its Application within the Italian Legal System" (1999) *European Public Law* 5, pp. 405 *et seq.* and LUIGI Malferrari, "State Liability for Violation of EC Law in Italy: The Reaction of the Corte di Cassazione to *Francovich* and Future Prospects in Light of its Decision of July 22, 1999, No. 500" (1999) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 59, pp. 809 *et seq.* For a general introductory overview (in English) on the Italian system of State liability see MARCELLO CLARICH, "The Liability of Public Authorities in Italian Law" in J. Bell

III. The Italian System of State Liability under Scrutiny

1. *Commission v. Italy* – A lost opportunity?

In December 2003, only a couple of months after the *Köbler*, the case of *Commission v. Italy*⁸¹² presented the Court with its first opportunity to rule on an infringement procedure initiated by the European Commission against a Member State based on the fact that a large fraction of the national courts, including a national supreme court, and the administrative authorities in that country had repeatedly decided a particular legal question contrary to Community law. Briefly put, the European Commission had instituted an infringement action against Italy based on Article 226 EC on the grounds that the latter maintained in force a law, which was repeatedly interpreted and applied contrary to Community law in the practice of the tax administration and the country's judiciary.⁸¹³ In its application the Commission particularly pointed out the flawed interpretation of Article 29(2) of the Law No 428/1990 by the Italian Supreme Court of Appeal, *Corte suprema di cassazione*, whose jurisprudence served as an example for so many other courts in Italy. This was the first time the Commission had declared so openly that an alleged infringement consisted in a national judiciary's misapplication of Community law.⁸¹⁴

and A. W. Bradley (eds.), *Governmental Liability: A Comparative Study* (London, United Kingdom National Committee of Comparative Law, 1991), pp. 228-248. Alternatively, see FRANCESCO DONATO BUSNELLI *et al.*, "Liability for damage caused by others under Italian law" in J. Spier (ed.), *Unification of Tort Law: Liability for damage caused by others* (The Hague/London/New York, Kluwer Law International, 2003), pp. 159 *et seq.*

⁸¹² A similar case, in which the Commission attacked the German legislature as a result of a repeatedly wrong interpretation of a national law by the *Bundesfinanzhof*, was the Case C-109/02, *Commission of the European Communities v. Federal Republic of Germany* [2003] ECR I-12691.

⁸¹³ The particular law in question in this case was Article 29(2) of Law No 428 of 29 December 1990 entitled '*Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee (legge comunitaria per il 1990)*'; hereinafter "Law No 428/1990". The application of Article 29(2) of this law by the administrative and judicial authorities allowed for the use of certain rules of evidence in relation to the repayment of taxes levied in breach of Community provisions. This practice rendered the exercise of the right to repayment of such taxes impossible or at least excessively difficult for the taxpayer. For more details on the factual background of the case see C-129/00, *Commission v. Italy*, *supra* note 510, paras. 4 *et seq.*

⁸¹⁴ See arguments brought forward by the Commission in *Ibid*, paras. 11-16.

However, in its final ruling in the case the Court of Justice did not go so far as to condemn Italy for breaches of Community law as a result of the erroneous interpretation of law by the judiciary. Instead, it based its reasoning on the fact that

by failing to amend Article 29(2) of Law No 428/1990, which is construed and applied by the administrative authorities and a substantial proportion of the courts, including the Corte suprema di cassazione, in such a way that the exercise of the right to repayment of charges levied in breach of Community rules is made excessively difficult for the taxpayer, the Italian Republic has failed to fulfil its obligations under the EC Treaty.⁸¹⁵

Therefore, according to the Court's ruling in the case, the infringement of EC law committed by the national courts was merely the result of an unclear legislative provision on this issue. Consequently, the CJEU argued that the breaches of EC law originated from the Italian legislature's failure to lay down detailed rules of evidence on this particular question.⁸¹⁶ Hence, the judiciary was cleared of the allegation of causing the violation of EC law in this context; the 'culprit' was identified as the legislature.

Contrary to the *Köbler* case, the Court in this case was not forced to find an infringement merely on the basis of a judicial act and in fact availed itself of the opportunity to circumvent it. It is nevertheless surprising that the CJEU opted to target only the legislature in this particular case, leaving the judiciary blameless with respect to the committed violations of EC law. This is even more surprising in light of the fact that only two months before, the CJEU had severely attacked the judiciary in the *Köbler* case. Hence, this case would have given the Court the chance to clarify some of the aspects left unclear in the *Köbler* ruling. One can of course only speculate why the CJEU opted to proceed in this way, but it appears as if the Court was increasingly aware of the danger that continuous attacks on the national judiciaries' (non-)application of Community law (and especially on the practice of the national

⁸¹⁵ Ibid, para. 41.

⁸¹⁶ Ibid.

supreme courts), might jeopardize the Court's long-time cooperation with the highest courts in the different Member States.⁸¹⁷ The comments made by Peter Wattel, a member of the Dutch Supreme Court (*Hoge Raad*), in his article on the *Köbler* ruling could be interpreted as a first sign of the disgruntlement of the Member States' highest courts.⁸¹⁸ In light of these considerations, the CJEU's ruling in *Commission v. Italy* could be regarded as a diplomatic solution to the Court's dilemma of having to balance between the effectiveness of Community law on the one hand and the preservation of what Komárek has called the "sincere cooperative relationship"⁸¹⁹ with the national supreme courts on the other.⁸²⁰

2. 'Second time lucky' – the CJEU's judgment in *Traghetti*

Soon after the Court's ruling in *Commission v. Italy*, the case of *Traghetti del Mediterraneo SpA v. Italy*⁸²¹ presented the CJEU with a second opportunity to rule on the non-compliance of Italian courts with Community law. This time the Court seized the occasion to do so.

a) Facts of the case

The case concerned a dispute between the Italian shipping company *Traghetti del Mediterraneo SpA* and the Italian State over direct subsidies, which had been awarded to *Tirrenia di Navigazione*, a competing national shipping company, by the Italian State. In 1981, *Traghetti* had brought a claim against its competitor before the *Tribunale di Napoli*, seeking compensation for the damage *Tirrenia* had caused it due its low fares, which could only be maintained through the State aid the company had

⁸¹⁷ See chapter I on the problems caused by the absence of an established judicial hierarchy in the EU.

⁸¹⁸ WATTEL, "Köbler, Cilfit and Welthgrove...", *supra* note 152, pp. 177, in which he reminded the Court that "[t]hose who live in glass houses should not throw stones" (Ibid, p. 184).

⁸¹⁹ JAN KOMÁREK, "Federal elements in the Community judicial system: Building coherence in the Community legal order" (2005) 42 *CML Rev.*, p. 21.

⁸²⁰ On this case see also MATTIA MAGRASSI, "Repubblica italiana condannata ai sensi degli art. 226 e 228 TCE per un orientamento della Suprema Corte di cassazione" (2004) *Diritto Pubblico Comparato ed Europeo* (II), pp. 1003 *et seq.*

⁸²¹ C-173/03, *Traghetti*, *supra* note 134, paras. 1 *et seq.*

previously received. *Traghetti*'s action for compensation on the grounds of unfair competition and abuse of a dominant position was, however, dismissed in the first instance by the *Tribunale di Napoli* and subsequently, on appeal by the *Corte d'appello di Napoli* and the *Corte suprema di cassazione*. All courts denied the illegality of the aid provided by the Italian State to *Tirrenia*.⁸²²

After the dismissal of *Traghetti*'s claim in last instance by the *Corte Suprema di Cassazione*, the plaintiff brought a State liability action before the *Tribunale di Genova* stating that the decision taken by the *Corte Suprema di cassazione* in the case was based on an erroneous interpretation of Community law, and moreover, that the Court had wrongly assumed that there was settled case-law by the CJEU on the issue. Therefore, the plaintiff argued, the *Corte Suprema di cassazione* had not only violated EC law, but also neglected its duty to refer the question to the CJEU for a preliminary ruling in line with its duty under Article 234(3) EC.⁸²³ The Italian State immediately rejected the liability claim by the plaintiff on the grounds that according to Article 2(2) of the 'Law No 117 about the reparation of damages caused by judicial acts and the personal liability of judges',⁸²⁴ State liability could never be invoked on the basis of a judicial decision whenever the liability claim related to the court's interpretation of provisions of law. Faced with conflicting arguments by the two parties, the *Tribunale di Genova* made a reference for a preliminary ruling to the CJEU according to Article 234 EC.⁸²⁵

b) The preliminary questions by the *Tribunale di Genova*

The *Tribunale di Genova* initially submitted two preliminary questions to the CJEU, the first of which inquired whether the *Francovich*-line established by the Court could be extended to also include breaches of Community law committed by

⁸²² Ibid, paras. 7-15.

⁸²³ Ibid, paras. 16-17.

⁸²⁴ *Legge n. 117 [sul] risarcimento dei danni cagionati nell'esercizio delle funzioni giudiziarie e responsabilità civile dei magistrati*, GURI Nr. 88, 13 Aprile 1988; hereafter also referred to as "Law No 117/88". The original text of the law (in Italian) is also available at www.giustizia.it/cassazione/leggi/1117_88.html#ART1.

⁸²⁵ C-173/03, *Traghetti*, *supra* note 134, paras. 18-20.

the judiciary. In light of the Court's affirmative ruling in the *Köbler* case, which was decided soon after the *Tribunale*'s reference, the national court later withdrew this first question.⁸²⁶ The second question, which directly concerned the established framework of State liability for judicial breaches under Italian law, was, however, maintained. The CJEU was essentially confronted with the question of whether a Member State's liability for judicial errors in the course of the application of Community law was impeded

in a manner incompatible with the principles of Community law by national legislation on State liability for judicial errors which:

- precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions,
- limits State liability solely to cases of intentional fault and serious misconduct on the part of the court.⁸²⁷

In order to provide a satisfactory answer to the latter question, the CJEU not only had to elaborate in more detail on the general conditions of Member State liability for judicial breaches of Community law as outlined in the *Köbler* ruling, but was also forced to test the compatibility of the Italian framework of State liability for judicial errors in light of the criteria set out in EC law.

c) State liability for judicial breaches in Italy – the epitome of group II (2) of our classificatory scheme

While public liability in Italy is generally grounded on Article 2043 of the Italian Civil Code,⁸²⁸ since 1988 the liability of the State for judicial violations has been regulated separately in the 'Law No 117 about the reparation of damages caused

⁸²⁶ Ibid, para. 22.

⁸²⁷ Ibid, para. 20.

⁸²⁸ A brief, but comprehensive overview on the basic principles of civil liability in Italy from a comparative perspective is provided in BUSNELLI *et al.*, "Liability...under Italian law," *supra* note 811, p. 7.

by judicial acts and the personal liability of judges'.⁸²⁹ Already at first glance one can ascertain that the Italian system strongly resembles other Member States pertaining to group II of our taxonomy, namely those countries that restrict the scope of State liability for damage caused by the judiciary according to either the source or the nature of the judicial act. While in the case of Austria the limitations are based on the *source* of the erroneous judicial act (sub-group I), in Italy and the rest of sub-group II of group II of our taxonomy, limitations are based on the *nature* of the judicial act causing the damage.⁸³⁰

Apart from the restrictions related to the nature of the judicial act, another prominent feature of the countries affiliated with sub-group II is the inclusive (or negative) character of their limitations. As outlined in the introductory paragraphs of this chapter, when it comes to judicial violations, countries featuring restrictions of an inclusive character to their public liability frameworks start from the basic premise that there is no general principle of State liability for judicial breaches under national law.⁸³¹ Based on this negative assumption, those countries subsequently strictly limit the application of such liability to an exceptional and narrowly-defined number of acts. Among the seven Member States in the second group of our classification, the countries of Germany, Slovenia and Romania adhere to such an inclusive approach, while the other four countries, namely Austria, Sweden, Poland and Italy, feature restrictions to their systems of State liability, which are exclusive (or positive) in character.⁸³² What is furthermore rather noteworthy is that, as far as the Member States featuring limitations of an inclusive character are concerned, the exceptions to the basic rejection of State liability for judicial breaches in these countries are all

⁸²⁹ An extensive commentary on the Italian Law No 117/1988 is provided by NICOLA PICARDI *et al.*, *La responsabilità civile dello stato giudice: Commentario alla legge 13 aprile 1988 n. 117 in tema di risarcimento dei danni cagionati nell'esercizio delle funzioni giudiziarie e responsabilità civile dei magistrati* (Padova, Cedam, 1990) and MICHELE GRAZIADEI and UGO MATTEI, "Judicial Responsibility in Italy: A New Statute" (1990) *The American Journal of Comparative Law* 38, pp. 103 *et seq.*

⁸³⁰ For a general overview of all the countries pertaining to sub-group II see graph on p. 227.

⁸³¹ See introductory comments on pp. 169 *et seq.*

⁸³² Contrary to the category of inclusive restrictions, systems that are characterized by exclusive (or positive) limitations accept that there is a generally-applicable system of State liability for judicial breaches. As a consequence, those countries merely exclude specific acts (Italy) or certain courts (Sweden) from its application.

cases of criminal or disciplinary offence committed by judicial organs. As noted above, we can identify a common nature to these exceptions in Germany, Slovenia and Romania.

In Germany, for instance, where the basic questions of State liability are addressed in Article 34 of the German Basic Law⁸³³ in conjunction with Article 839 of the German Civil Code,⁸³⁴ Article 839(2) *BGB* declares in a general manner that liability for judicial acts is limited to cases when the breach of duty committed by the judiciary constitutes a criminal offence.⁸³⁵

*Verletzt ein Beamter bei dem Urteil in einer Rechtssache seine Amtspflicht, so ist er für den daraus entstehenden Schaden nur dann verantwortlich, wenn die Pflichtverletzung in einer Straftat besteht. Auf eine pflichtwidrige Verweigerung oder Verzögerung der Ausübung des Amtes findet diese Vorschrift keine Anwendung.*⁸³⁶

Similar to the *problématique* raised in the *Traghetti* judgment, we are therefore confronted with yet another restriction to the principle of State liability for judicial breaches referring to the nature of the judicial act generating the breach. As under Italian law where Article 2(2) violates the principle of effectiveness under Community

⁸³³ Article 34(1) *Grundgesetz* (GG): “Verletzt jemand in Ausübung eines ihm anvertrauten öffentlichen Amtes die ihm einem Dritten gegenüber obliegende Amtspflicht, so trifft die Verantwortlichkeit grundsätzlich den Staat oder die Körperschaft, in deren Dienst er steht. Bei Vorsatz oder grober Fahrlässigkeit bleibt der Rückgriff vorbehalten [...]”

⁸³⁴ Article 839(1) *BGB*: “Verletzt ein Beamter vorsätzlich oder fahrlässig die ihm einem Dritten gegenüber obliegende Amtspflicht, so hat er dem Dritten den daraus entstehenden Schaden zu ersetzen. Fällt dem Beamten nur Fahrlässigkeit zur Last, so kann er nur dann in Anspruch genommen werden, wenn der Verletzte nicht auf andere Weise Ersatz zu erlangen mag.” For a brief overview (in English) on the German civil liability scheme see VAN DAM, *Tort Law*, *supra* note 128, pp. 61 *et seq.*; for a synopsis of the country’s public liability regime see *Ibid*, pp. 481 *et seq.*

⁸³⁵ On the reform of the Italian law on judicial responsibility and for an interesting comparison between the German and the Italian system of State liability for judicial breaches see SABINE STUTH, “Staatshaftung für Justizfehler - Italiens neues Richterhaftungsgesetz Im Vergleich zur deutschen Rechtslage” (1990) 17 *EuGRZ* 15/16, pp. 353 *et seq.*

⁸³⁶ Article 839(2) *BGB*. In this context see also SCHÖNDORF-HAUBOLD, “Die Haftung...,” *supra* note 110, pp. 114 *et seq.*; FRITZ OSSENBUHL, *Staatshaftungsrecht*, 5th ed. (Munich, C.H. Beck Verlag, 1998), Part 2, § 7, 3-5, as well as JÖRG GUNDEL, “Gemeinschaftsrechtliche Haftungsvorhaben für judikatives Unrecht - Konsequenzen für die Rechtskraft und das deutsche ‘Richterprivileg’ (§ 839 Abs. 2 BGB)” (2004) *EWS* 1, pp. 8 *et seq.*

law and therefore cannot be applied in cases with a Community-law component, also the German *Spruchrichterprivileg* violates the principle of effectiveness in that it makes it difficult or almost impossible to bring a successful claim against the State for violations of Community law by its judicial organs.⁸³⁷

Rather similar to the German system of State liability for judicial breaches is the respective regime under Estonian law. The general right to compensation is already regulated in Article 25 of the Estonian Constitution,⁸³⁸ which has been interpreted to apply equally to damage caused by public authorities. According to Article 15(1) of the Estonian State Liability Act,⁸³⁹ Estonia features a system of State liability for judicial breaches comparable to the one in Germany in that

[a] person may claim compensation for damage caused in the course of judicial proceedings or extrajudicial hearing of a matter concerning an administrative offence or a lease dispute, including damage caused by a court decision, a decision made in the matter of an administrative offence or a decision of a lease committee, only if a judge or the official who extrajudicially heard the matter of the administrative offence or the lease dispute *committed a criminal offence in the course of these proceedings*.⁸⁴⁰

Acknowledging that there is a basic principle of State liability even for judicial acts, Italy, just like Austria, Sweden and others, belongs to the group of countries featuring restrictions of an exclusive (or positive) nature. Moreover, the Italian system of State liability for judicial breaches, which is at the focus of the CJEU's ruling in

⁸³⁷ In a similar manner, HEIKO BERTELMANN, *Die Europäisierung des Staatshaftungsrechts: Eine Untersuchung zum Einfluss des Europäischen Gemeinschaftsrechts auf das deutsche Staatshaftungsrecht unter besonderer Berücksichtigung der Haftung für judikatives Unrecht* (Frankfurt am Main, P. Lang, 2005), pp. 213-214. For an early contribution on the implications of the *Francovich*-ruling on the German system of State liability in general, see STEPHAN SELTENREICH, *Die Francovich-Rechtsprechung des EuGH und ihre Auswirkungen auf das deutsche Staatshaftungsrecht* (Konstanz, Hartung-Gorre Verlag, 1997).

⁸³⁸ Article 25 of the Estonian Constitution: "Everyone has the right to compensation for moral and material damage caused by unlawful action of any person."

⁸³⁹ State Liability Act of 2 May 2001 (RT^I I 2001, 47, 260), entered into force on 1 January 2002.

⁸⁴⁰ Article 15(1) State Liability Act, which was amended on 22 January 2003 and entered into force on 1 July 2003, RT I 2003, 15, 86 (emphasis added).

Traghetti, also belongs to subgroup II of our taxonomy.⁸⁴¹ In Italy, the Law No 117/1988 on judicial responsibility was enacted following a referendum held in November 1987, which led to the abrogation of the previous liability regime, which was based on Articles 55, 56 and 75 of the Italian Code of Civil Procedure. The latter system had been even more restrictive in its approach to State liability for judicial errors.⁸⁴² Contrary to the old system, Article 2(1) of the Law No 117/1988 generally opens up a wide scope of liability of the State for damage caused to an individual as a result of a judicial act.⁸⁴³ Nevertheless, Article 2(2) of the same law immediately introduces the exceptions to this general rule. Accordingly, the concept of State liability for judicial breaches is limited in that “[i]n the exercise of judicial functions the interpretation of provisions of law or the assessment of facts and evidence shall not give rise to liability.”⁸⁴⁴ This means that in Italy, State liability claims can never be lodged against an allegedly harmful judicial act if the infringement committed by the national court relates to its interpretation of legal provisions or its assessment of facts and evidence. Consequently, the restrictions established in Article 2(2) of the Law No 117/1988 exclude a large part of the judges’ activities from the scope of the general State liability regime.⁸⁴⁵

With reference to the preliminary questions submitted by the *Tribunale di Genova* in the *Traghetti* case, in which the Court had asked the CJEU whether a restriction as formulated in Article 2(2) of the Italian Law No 117/1988 was

⁸⁴¹ For a graphic overview of all the countries affiliated with group II, see graph on p. 227.

⁸⁴² On the ‘old’ system as well as the new liability regime enacted in Italy in 1988, see, for example, GRAZIADEI and MATTEI, “Judicial Responsibility...,” *supra* note 829, pp. 103 *et seq.*

⁸⁴³ Article 2(2) Law No 117/1988: “Anybody whose rights have been infringed by judicial acts, which have been performed intentionally or with gross negligence, or anybody who has been harmed on the basis of denial of justice, has the right to hold the State liable and claim compensation for the material and immaterial damage sustained.”

⁸⁴⁴ Art. 2(2) *Legge 13 aprile 1988, n. 177*: “*Nell’esercizio delle funzioni giudiziarie non può dar luogo a responsabilità l’attività di interpretazione di norme di diritto né quella di valutazione del fatto e delle prove.*” PICARDI *et al.*, *Commentario alla legge 13 aprile 1988 n. 117*, *supra* note 829, pp. 24 *et seq.*; English translation as in C-173/03, *Traghetti*, *supra* note 134, para. 4.

⁸⁴⁵ In an article published in 2006, Vincenzo Roppo confirmed the rather restrictive approach of the current framework in Italy and noted that fifteen years after the enactment of the new Italian State liability regime featuring the restrictions we have just outlined above, only a single individual had succeeded until then to be compensated under this mechanism. VINCENZO ROPPO, “Responsabilità dello Stato per fatto della giurisdizione e diritto europeo: una *case story* in attesa del finale” (2006) *Rivista di diritto privato* 2, p. 24.

compatible with the principles laid down under Community law, the Court had a very clear and straightforward answer. In line with the Opinion of the Advocate General in the case, the CJEU expressly stated that excluding

any possibility that State liability might be incurred where the infringement allegedly committed by the national court relates to the assessment which it made of facts or evidence would also amount to depriving the principle set out in the *Köbler* judgment of all practical effect with regard to manifest infringements of Community law for which courts adjudicating at last instance were responsible.⁸⁴⁶

In a similar manner, the CJEU rejected the provision exempting judicial acts of legal interpretation from the public liability scheme.⁸⁴⁷ In fact, the Court stipulated that any such invasive restriction of the principle of Member State liability as had been established under Article 2(2) of the Italian Law No 117/1988, violated the principle of effectiveness and was therefore incompatible with Community law. In light of the principle of national procedural autonomy and the conditions imposed on the Member States regarding the standards of equivalence and effectiveness,⁸⁴⁸ which we have already outlined in chapter I of the thesis, restrictions of such sort would “make it impossible or excessively difficult to obtain reparation”.⁸⁴⁹ Exempting the courts’ legal interpretation and their assessment of facts or evidence from the general scope of a State’s liability would not only weaken the procedural guarantees of individuals under EC law, but considering that a large part of the judiciary’s duty, especially with respect to courts of last instance consists in interpreting and assessing

⁸⁴⁶ C-173/03, *Traghetti*, *supra* note 134, para. 40. See also Opinion of Advocate General Léger in C-173/03, *Traghetti*, *supra* note 134, paras. 48 *et seq.*

⁸⁴⁷ C-173/03, *Traghetti*, *supra* note 134, paras. 33-34.

⁸⁴⁸ See cases such as Case 33/76, *Rewe-Zentralfinanz*, *supra* note 143, para. 6; Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1993] I-04599; Joined cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-04705.

⁸⁴⁹ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 67.

the applicable law and facts of a case, a domestic restriction of this kind would be too invasive and would render the *Köbler* doctrine nugatory.⁸⁵⁰

The Court's arguments in the *Traghetti* ruling appear to be justified, especially in light of the fact that the interpretation of law is such a fundamental function of the judiciary in general and of the highest courts in particular. After all, highest courts have the task of unifying the interpretation of national law. Indeed, the same function has been awarded to the CJEU, namely to ensure the uniform interpretation of Community law, which also underlines the importance of the duty of national courts of last instance to refer questions for a preliminary ruling to the CJEU according to Article 234(3) EC. From the perspective of Community law, substantive or procedural restrictions under national law similar to the ones set up in Italy in Article 2(2) would render it impossible or excessively difficult for an individual to obtain compensation. The CJEU's reasoning in this case is therefore intrinsically linked to the conditions established in its jurisprudence on the principle of national procedural autonomy, and especially the compliance with the principle of effectiveness.⁸⁵¹

A restriction like the Italian Article 2(2) of the Law No 117/1988 will continue to be fully applicable under national law. However, whenever the individual's claim for compensation from the Italian State stems from a judicial violation of Community law, the limitations contained in Article 2(2) are to be set aside. This has been expressly confirmed by the CJEU in its *Traghetti* ruling.⁸⁵²

d) A double-tuned system - Italy's added affiliation with group III

The second part of the preliminary question referred to the CJEU by the *Tribunale di Genova* in the case *Traghetti del Mediterraneo SpA v. Italy* concerned yet another inherent restriction to the Italian system of State liability for judicial

⁸⁵⁰ C-173/03, *Traghetti*, *supra* note 134, para. 36.

⁸⁵¹ Case 33/76, *Rewe-Zentralfinanz*, *supra* note 143, para. 6. On the principle of effectiveness see, *inter alia*, C-46 & 48/93, *Brasserie*, *supra* note 4, para. 67; C-312/93, *Peterbroeck*, *supra* note 848, paras. 1 *et seq.*; C-430/93 and C-431/93, *van Schijndel*, *supra* note 848, *et al.*

⁸⁵² C-173/03, *Traghetti*, *supra* note 134, para. 46.

breaches. In addition to the limitations defined in Article 2(2), Article 2(1) of the Law No 117/1988 further declares that

[a]ny person who has sustained unjustifiable damage as a result of judicial conduct, acts or measures on the part of a judge who is guilty of *intentional fault* or *serious misconduct* in the exercise of his functions, or as a result of *denial of justice*, may bring proceedings against the State for compensation [...].⁸⁵³

Following the general definition in paragraph 1, Article 2(3) of the Law No 117/1988 subsequently defines the notion of ‘gross negligence’ as used in the first paragraph of the Article, whereas Article 3(1) of the Law No 117/1988 provides a more detailed account on how to interpret the concept of ‘denial of justice’, which is equally mentioned in Article 2(1) of the same law.

The additional features of the Italian system of State liability for judicial breaches actually lead us directly to the next group of our classificatory scheme, which is group III.⁸⁵⁴ While we will certainly analyse the characteristic traits of this group by means of a selected national example, the last aspect of the CJEU’s judgment in *Traghetti* provides the perfect transition to our next group.

⁸⁵³ Ibid, para. 4 (emphasis added).

⁸⁵⁴ For a detailed analysis of the Member States contained in group III see chapter V, pp. 229 *et seq.*

IV. Graphic Overview of Group II

<i>Exclusion of State liability...</i>		AUSTRIA	ESTONIA	GERMANY	ITALY	ROMANIA	SLOVENIA	SWEDEN	Restrictions of an EXCLUSIVE NATURE
...for acts/omissions by national SUPREME COURTS		✓						✓ 855	
...for judicial acts of LEGAL INTERPRETATION and the EVALUATION OF FACTS and EVIDENCE					✓ 856				
<i>Restriction of State liability to...</i>									
....cases of CRIMINAL or DISCIPLINARY offences	violations constituting “a crime in office” according to the criminal code			✓ 857					Restrictions of an INCLUSIVE NATURE
	violations constituting a crime according to the criminal code/unlawful infringements (fraud, corruption...)		✓ 858				✓ 859		
	cases of criminal or disciplinary offence					✓ 860			

⁸⁵⁵ The courts falling under this provision are the Supreme Court (*Högsta domstolen*) and the Supreme Administrative Court (*Regeringsrätten*).

⁸⁵⁶ Declared to be in contradiction with the *Francovich* line in C-173/03, *Traghetti*, *supra* note 134, paras. 1 *et seq.*

⁸⁵⁷ See Articles 331–358 *StGB* (*‘Straftaten im Amt’*). This concerns especially the provisions of “*Richterbestechung*” (Article 334 *StGB*) and “*Rechtsbeugung*” (Article 336 *StGB*). However, according to Article 839(3) *BGB* the right to claim compensation is lost if the victim has either intentionally or negligently omitted to mitigate his or her loss by making use of any other legal remedy available against the official in question. This also classifies Germany for group IV of our classification (to be discussed in chapter VI).

⁸⁵⁸ Article 15 of the Estonian State Liability Act.

⁸⁵⁹ Principled legal opinion of the Slovenian Supreme Court, *VSS* 2/95.

⁸⁶⁰ Art. 94(4) Magistrate’s Statute Act (Law no. 303/2004). Article 504 Code of Criminal Procedure foresees compensation for illegal arrest or detention and wrongful conviction.

CHAPTER V.
RESTRICTED FORM OF STATE LIABILITY UNDER
DOMESTIC LAW LIMITED BY THE
DEGREE OF FAULT IN A JUDICIAL ACT
(GROUP III)

Group III of our classificatory scheme embraces all those Member States which impose limits to their concepts of State liability for judicial breaches according to the degree of fault inferred from the judicial act. An interesting example in this respect is the case of Italy, one of the countries adhering to more than one group of our classificatory scheme. While we have discussed the implications of the *Köbler*-doctrine on Italian law in light of the CJEU's judgment in the case *Traghetti del Mediterraneo SpA v. Italy*⁸⁶¹ at the end of the previous chapter, Italy also introduced limitations to its State liability regime for judicial breaches which additionally render the country a valid candidate for our third group. In fact, on the basis of restrictions contained in Article 2(1) of the Law No 117/1988, the Italian system also limits the State's liability to cases of "intentional fault or serious misconduct" on the part of the court, as well as to instances of "denial of justice".⁸⁶² Hence, apart from its affiliation with group II, Italy also qualifies for the third group of our taxonomy.⁸⁶³

As we have seen in chapter I of our study, under Community law Member State liability for harm caused to an individual by a judicial breach attributable to a court of last instance can only be incurred in the exceptional case that the court has committed a 'manifest' infringement of EC law.⁸⁶⁴ With reference to the second part of the preliminary question lodged in front of the CJEU in *Traghetti*, the Italian court essentially asked whether the additional restrictions contained in Article 2(1) of the

⁸⁶¹ C-173/03, *Traghetti*, *supra* note 134, paras. 1 *et seq.*

⁸⁶² Article 2(1) Law No 117/1988: "*Chi ha subito un danno ingiusto per effetto di un comportamento, di un atto o di un provvedimento giudiziario posto in essere dal magistrato con dolo o colpa grave nell'esercizio delle sue funzioni ovvero per diniego di giustizia può agire contro lo stato per ottenere il risarcimento dei danni patrimoniali e anche di quelli non patrimoniali che derivino da privazione della libertà personale*" (emphasis added).

⁸⁶³ For a general tabular overview of the countries pertaining to group III, see p. 307.

⁸⁶⁴ C-224/01, *Köbler*, *supra* note 1, para. 53.

Italian law No 117/1988 were compatible with the requirements set up under Community law. The second half of the *Tribunale*'s preliminary question therefore raised the issue to what extent the CJEU's requirement of a 'manifest breach' as formulated in the *Köbler* ruling conforms to the various degrees of fault as required under the national laws of several Member States. This last aspect will also be a key point of analysis in this chapter. While we will discuss all the intricacies of this question in the forthcoming paragraphs, we will anticipate that in reply to the Italian Court's query in *Traghetti*, the CJEU ruled that a State's liability for judicial breaches preconditioned by fault or grave negligence was in conformity with Community law as long as the criteria were not stricter than those set up under EC law.⁸⁶⁵ With respect to breaches of Community law a stricter conditionality required for the claim of State liability under national law is therefore not permissible. A stricter conditionality under national law would limit the individual's right to a remedy and violate the principles of equivalence and effectiveness, both of which are firmly anchored in the Community legal order.⁸⁶⁶

Other Member States that are faced with the same implications of the Court's ruling in *Traghetti* are, apart from Italy, countries such as Spain, Denmark, France, Sweden and Austria.⁸⁶⁷ Under Swedish law, for example, the requirements of fault and negligence in this context are based on objective, rather than subjective criteria. This implies that the scenario of how the State should have acted constitutes the benchmark for the evaluation of the act.⁸⁶⁸ Thereby, the clarity of the legal framework, the margin of discretion of the public authority and the "excusableness" of the mistake are taken into account when evaluating the degree of fault.

⁸⁶⁵ C-173/03, *Traghetti*, *supra* note 134, para. 44.

⁸⁶⁶ For an interesting comparison between the system of public liability for judicial acts in France and in Italy, see JACQUES VAN COMPERNOLLE and G. CLOSSET-MARCHAL, "La responsabilité du fait des actes du service public de la justice: éléments de droit comparé et perspectives de 'lege ferenda'", *La Responsabilité des Pouvoirs Publics: Actes du Colloque Interuniversitaire organisé les 14 et 15 Mars 1991 par la Faculté de Droit de l'Université Catholique de Louvain et la Faculté de Droit de l'Université Libre de Bruxelles* (Brussels, Bruylant, 1991), pp. 413-438.

⁸⁶⁷ See the tabular overview of all the Member States adhering to group III on p. 307.

⁸⁶⁸ BENGTSSON, *Det allmännas...*, *supra* note 708, *et al.*

As we have already mentioned in chapter I, the CJEU's terminology in requiring a 'sufficiently serious breach' in this context had created difficulties for the Member States in terms of squaring such a breach with the existing regime of State liability under national law. In the Court's ruling in *Brasserie du Pêcheur/Factortame* the CJEU had declared that the element of fault was not a relevant factor in the classification of a violation of EC law and rather required the breach to be 'sufficiently serious'.⁸⁶⁹ In the *Köbler* judgment the CJEU once again refused to introduce the notion of 'fault' in relation to the required qualification of a breach. With respect to judicial breaches of Community law, especially countries pertaining to this third group of our classification will be faced with the question of how the Court's requirement of a 'manifest breach' corresponds with the degree of fault they have established for such cases under national law. Briefly put, "[w]hat degree of fault, if any, is required"⁸⁷⁰? This was precisely the question which had been referred to the CJEU by the Italian Court in the *Traghetti* case.

Another interesting example in this context is France. Contrary to Italy, France merely adheres to group III of our classificatory scheme, but it nevertheless features a hybrid-system when it comes to questions of State liability for judicial breaches. The particular situation under French law and the impacts of the *Köbler* regime on the national system of countries pertaining to group III will constitute chapter V of our analysis.

⁸⁶⁹ C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 75-80. In this context see also PIERRE LAROCHE, "The *Brasserie du Pêcheur* Puzzle" in J. Wouters *et al.* (eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune* (Antwerpen, Intersentia, 2001), pp. 114 *et seq.*

⁸⁷⁰ A question that was raised by Francis Jacobs in precisely this context. See FRANCIS JACOBS, "Some Remarks on Community and Member State Liability" in J. Wouters *et al.* (eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune* (Antwerpen, Intersentia, 2001), p. 130.

The Case of FRANCE

I. The Concept of State Liability for Judicial Breaches in France

1. Double duality: Dual structures – dual solutions

a) The principle of separation of the courts in France

In France the development of two separate regimes of public as opposed to private law liability was the consequence of a fundamental disjuncture between the different branches of courts and the concomitant principle of strict separation of their respective areas of competence.⁸⁷¹ The reasons for a court structure divided between the *justice judiciaire*⁸⁷² and the *justice administrative*⁸⁷³ are historical and rooted in the principle of separation of powers as defined by Montesquieu.⁸⁷⁴ A central and well-known tenet of his beliefs was the idea that the State should consist of three distinct and separate powers: the executive, the legislature and the judiciary. Their separation would be a prerequisite for the effective protection of individual freedoms. At the end of the 18th century, the fathers of the French revolution advanced a further principle from that formulated by Montesquieu, which mirrored their deep suspicion

⁸⁷¹ CHRISTIAN DADOMO and SUSAN FARRAN, *The French Legal System*, 2nd ed. (London, Sweet & Maxwell, 1996), p. 46.

⁸⁷² The *juridiction judiciaire* is defined as “ensemble des tribunaux de l’ordre judiciaire (tribunaux répressifs, tribunaux civils, commerciaux, prud’homaux, ruraux et de sécurité sociale) soumis au contrôle de la Cour de cassation.” As in RAYMOND GUILLIEN and JEAN VINCENT, *Lexique des termes juridiques*, 15th ed. (Paris, Dalloz, 2005), p. 366. Henceforth also referred to as ‘private law/ordinary courts’ or ‘ordinary jurisdiction’.

⁸⁷³ The *juridiction administrative* consists of “ensemble des juridictions de l’ordre administrative, normalement soumises au contrôle du Conseil d’État soit par la voie de l’appel, soit par la voie de la cassation. L’expression est aussi employée pour caractériser n’importe quelle juridiction de cet ensemble.” Definition as in Ibid, p. 365. Henceforth also referred to as ‘public law/administrative courts’ or ‘administrative jurisdiction’. The aforementioned English translations of *justice judiciaire* and *justice administrative* follow JOHN BELL *et al.*, *Principles of French Law* (Oxford, Oxford University Press, 1998), p. 37.

⁸⁷⁴ See, *inter alia*, MONTESQUIEU, *De l’esprit des lois* (1748) L. XI., Ch. VI.: “Il n’y a point encore de liberté si la puissance de juger n’est pas séparée de la puissance législative et de l’exécutrice. Si elle était jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens serait arbitraire: car le juge serait législateur. Si elle était jointe à la puissance exécutrice, le juge pourrait avoir la force d’un oppresseur.”

of the judicial branch at the time.⁸⁷⁵ It was established that ordinary courts should not be competent to decide upon disputes involving the executive power and its members, because it would force the administrative branch to assume a subordinate position with respect to the judiciary.

The principle of strict separation of administration and judiciary was initially laid down in the Act of 16-24 August 1790, which governed the relationship between the judiciary and the two remaining branches of the State, and established the clear separation of the judicial and the legislative branch. It also prohibited ordinary courts from preventing or suspending the application and implementation of Acts of Parliament. Furthermore, judges were banned from interpreting such Acts.⁸⁷⁶ Accordingly, Article 13, Title II of the Act proclaimed that

[t]he functions of the judiciary are and remain distinct and separate from those of the administration. Judges shall not, without incurring criminal liability, interfere in any manner whatsoever with the actions of the administration nor summon administrators to appear before them in order to account for their functions.⁸⁷⁷

In 1795, this provision was reiterated in the *Décret of 16 fructidor an III*, which stated that courts were banned by law from subjecting administrative acts, whatever their nature, to judicial review.⁸⁷⁸ These two provisions still provide the only

⁸⁷⁵ The suspicion stems from the monarchical times. The revolutionaries were determined to stop the resurgence of a strong judiciary. In their view, judges interfering with the State's affairs would go against the sound functioning of the State and the principle of separation of powers. See also CAPPELLETTI, *The Judicial Process...*, *supra* note 49, pp. 191 *et seq.*

⁸⁷⁶ If laws were unclear, judges had to refer to the legislature for interpretation by way of *référé législatif*.

⁸⁷⁷ English translation by DADOMO and FARRAN, *The French Legal System*, *supra* note 871, p. 47.

⁸⁷⁸ "*Défenses itératives sont faites aux tribunaux de connaître des actes d'administration, de quelque espèce qu'ils soient, aux peines de droit.*" On the meaning of this provision also JEAN-MARIE AUBY, "Dualité juridictionnelle et dualisme juridique" in J. M. Auby *et al.* (eds.), *Le Contrôle Juridictionnel de l'Administration. Bilan critique* (Paris, Economica, 1991), p. 112.

legislative guidance for the division of competences between the ordinary and administrative courts in France today.⁸⁷⁹

While these legal provisions prevented ordinary courts from interfering with administrative affairs, they did not identify any special court so empowered. This situation lasted until 1800 when the *Conseils de Préfecture* and the *Conseil d'État*⁸⁸⁰ were created. The *Conseil d'État* was only fully recognized as a court decades after its creation, when it was conferred with *justice déléguée*, i.e. the power to review administrative action, by the Act of 24 May 1872. From then on, the *pouvoir administratif* had its own supreme court for administrative matters, which operated separately from the *justice judiciaire*.⁸⁸¹ Because of this historical evolution, broadly-speaking France is now faced with a dual system of courts divided between the *ordre judiciaire*, which exercises both civil and criminal jurisdiction and the *ordre administratif*.⁸⁸² The courts pertaining to the *ordre administratif* have exclusive jurisdiction in cases relating to public law and involving individuals in the *juridictions de droit commun* on the one hand, and the State, a civil servant, a State corporation or any public authority on the other.⁸⁸³ For cases of conflict, there is the *Tribunal des*

⁸⁷⁹ The French terminology in relation to *courts* is diverse. A set of different expressions, such as *juridiction*, *tribunal* and *cour* are used to describe a 'court'. *Tribunal* is closest to the conception of a court as both an institution and a location. *Cour* is either the name given to specific courts on historical grounds or to new courts outside France (such as the CJEU or the ECHR). The term *juridiction* describes the judicial function of an institution as a judicial as opposed to an administrative body. The *Conseil Constitutionnel* and the *Conseil d'État* are formally 'councils', but in practice courts. As in BELL *et al.*, *Principles*, *supra* note 873, p. 37.

⁸⁸⁰ Henceforth also referred to as "*CE*".

⁸⁸¹ Originally, the *CE* only served to advise the government in its law-making functions before it was attributed the role as a court for administrative matters. Today the *CE* still exercises both functions, as a consultative body and as a judicial body. In its judicial functions the *CE* operates as a court of first instance (ex: *recours en annulation*), an appeal court (for the 26 *tribunaux administratifs*, even though some appeals of these *tribunaux* now go to the five *cours administratives d'appel*, which were created in 1989 to reduce the workload of the *Conseil d'État*) and a court of cassation. There is no further right of appeal from the *cour administrative d'appel*, only the right to apply to the *Conseil d'État* to have a decision quashed for being contrary to the law (*recours en cassation*).

⁸⁸² BRICE DICKSON, *Introduction to French Law* (London, Longman Group Limited, 1994), p. 59. To be precise the system actually operates against the backdrop of four different jurisdictional orders: *les juridictions judiciaires*, *les juridictions administratives*, *les juridictions en dehors des ordres* (*Tribunal des Conflits*, *Conseil Constitutionnel*), and *les juridictions politiques*.

⁸⁸³ *Juridictions de droit commun*, i.e. courts of general jurisdiction, are the courts which have jurisdiction to try all cases, except those for which other courts have been given special jurisdiction by statute. The latter courts, on the contrary, are called *juridictions d'exception*, or specialized courts. These courts can only hear cases for which they have been given express jurisdiction. Overall, the

Conflits, which was created in 1872 and has since had the function of deciding whether a case should be heard by the administrative courts or the private law courts, i.e. whether the case is a matter of public or private law. The *Tribunal des Conflits* thereby determines which court has jurisdiction. Only when there are irreconcilable decisions by both jurisdictional branches relating to a specific issue can the *Tribunal des Conflits* itself decide the case.⁸⁸⁴

While the *Conseil Constitutionnel* has not gone as far as to give the principle of separation of powers constitutional value, it has stated in the past that the establishment of a separate system of courts is a constitutional requirement.⁸⁸⁵ In other words, the merger of the two aforementioned *ordres juridiques* would be impossible under the 1958 Constitution. The existence of an independent system of ordinary courts is expressly provided for in Title VIII of that Constitution. Moreover, even though the principle of a separate system of administrative courts was not expressly laid down in the Constitution, it was recognized by the *Conseil Constitutionnel* in its decision of 22 July 1980,⁸⁸⁶ which referred to the fundamental principles recognized by the laws of the Republic and, in particular, to the Act of 24 May 1872 on the organization of the *Conseil d'État*.⁸⁸⁷ In a further decision of 23 January 1987⁸⁸⁸ the Constitutional Council ruled that the principle of separation of ordinary and

structure of the administrative courts is quite different from that of the ordinary courts. While the *ordre judiciaire* consists of a few courts of general jurisdiction, the administrative judicial hierarchy is characterized by a number of specialized courts with diverse functions and specific jurisdiction. One common feature of both court structures is the existence of a supreme court at the top of each order, i.e. the *Cour de Cassation* for the *ordre judiciaire* and the *Conseil d'État* at the top of the *ordre administratif*. A detailed overview of the French jurisdictional order can be found, *inter alia*, in C. LAROCHE-FLAVIN, *La machine judiciaire* (Paris, Éditions du Seuil, 1968), pp. 25 *et seq.*

⁸⁸⁴ Cf. DADOMO and FARRAN, *The French Legal System*, *supra* note 871, p. 107; BELL *et al.*, *Principles*, *supra* note 873, p. 40.

⁸⁸⁵ *Conseil Constitutionnel*, *Décision* n° 86-224 DC du 23 janvier 1987, *R.F.D.A.* 287.

⁸⁸⁶ *Conseil Constitutionnel*, *Décision* n° 80-119 DC du 22 juillet 1980, *R.D.C.C.* 2.

⁸⁸⁷ *Ibid*: “*Considérant qu’il résulte des dispositions de l’article 64 de la Constitution en ce qui concerne l’autorité judiciaire et des principes fondamentaux reconnus par les lois de la République en ce qui concerne, depuis la loi du 24 mai 1872, la juridiction administrative, que l’indépendance des juridictions est garantie ainsi que le caractère spécifique de leurs fonctions sur lesquelles ne peuvent empiéter ni le législateur ni le Gouvernement [...]*” (emphasis added).

⁸⁸⁸ CC, n° 86-224 DC (1987), *supra* note 885.

administrative courts had no constitutional value *per se*, but that there was, however, a principle recognized by the laws of the Republic according to which,

with the exception of those matters which by nature are reserved for the judicial authority, the annulment or amendment of decisions taken, in the exercise of public power, by the executive authorities, their agents, local governments, or those bodies under their authority or control, fall, in the last resort, within the jurisdiction of the administrative courts.⁸⁸⁹

Put briefly, the *Conseil Constitutionnel* proclaimed that the existence of a system of administrative courts with distinct powers of judicial review for acts of public authorities was a fundamental principle recognized by the laws of the Republic. Indeed, the role of the *Conseil d'État* as an administrative court was finally confirmed by a series of laws adopted during the Second, Third and Fourth Republics.⁸⁹⁰

b) Dual concepts of private and public law liability

The two-fold division of courts in France has rendered it difficult to draw a clear line of demarcation between the competences of the courts of the *ordre judiciaire* and those of the *ordre administratif*. There is no statute or legislative provision which provides for a delimiting catalogue of competences and which stipulates the kind of disputes that are reserved exclusively for administrative or ordinary courts. The

⁸⁸⁹ Ibid, para. 15: “*Considérant que les dispositions des articles 10 et 13 de la loi des 16 et 24 août 1790 et du décret du 16 fructidor An III qui ont posé dans sa généralité le principe de séparation des autorités administratives et judiciaires n'ont pas en elles-mêmes valeur constitutionnelle; que, néanmoins, conformément à la conception française de la séparation des pouvoirs, figure au nombre des ‘principes fondamentaux reconnus par les lois de la République’ celui selon lequel, à l’exception des matières réservées par nature à l’autorité judiciaire, relève en dernier ressort de la compétence de la juridiction administrative l’annulation ou la réformation des décisions prises, dans l’exercice des prérogatives de puissance publique, par les autorités exerçant le pouvoir exécutif, leurs agents, les collectivités territoriales de la République ou les organismes publics placés sous leur autorité ou leur contrôle...*” (emphasis added). See English translation of the judgment in DADOMO and FARRAN, *The French Legal System*, *supra* note 871, p. 49.

⁸⁹⁰ See the Acts of March 3, 1849 and May 24, 1872 and the *ordonnance* of July 31, 1945. On the question of separation of courts in France see, *inter alia*, JEAN DUPUIS, “La pratique de la justice au regard du dualisme juridictionnel: Aspects judiciaires (L’élaboration des décisions)” in J. M. Auby *et al.* (eds.), *Le contrôle juridictionnel de l’administration, Bilan critique* (Paris, Economica, 1991), pp. 115 *et seq.*

existing criteria of demarcation were developed purely by academics and through adjudication. Overall, the delimitation between ordinary and administrative courts in France is far from straightforward. Frequently the decision appears to be taken along the lines of which type of law is involved in a particular case. However, this in turn creates the difficult problem of trying to define concisely what is part of administrative law and what constitutes civil or criminal law. In this context, the two key criteria of French administrative law, which are represented by the notions of *puissance publique* and *service public*, are an indispensable tool in deciding on the jurisdictional question.⁸⁹¹

The issue of jurisdictional delimitation in France also heralded a conflict concerning the general question of State liability. What court would be competent to rule on public liability claims? Already in 1855, in the decision *Rotschild*⁸⁹² the *Conseil d'Etat* (at the time acting as judicial authority in case of conflict) had rejected the claim by ordinary courts that they were competent to hear cases of liability concerning public authorities based on Articles 1382 *et seq.* of the Civil Code.⁸⁹³

⁸⁹¹ DICKSON, *Introduction...*, *supra* note 882, p. 61. On the issue of the division of competences between the judicial branches see AUBY, "Dualité...", *supra* note 879, p. 103.

⁸⁹² *Arrêt Rotschild*, 6 décembre 1855, D., 1859, 3, 34: "Considérant [...] que ces rapports, ces droits et ces obligations ne peuvent être réglés selon les principes et les dispositions du seul droit civil et comme ils le sont de particulier à particulier; que, notamment en ce qui touche la responsabilité de l'Etat en cas de faute, de négligence ou d'erreur commises par l'administration, cette responsabilité n'est ni générale, ni absolue, qu'elle se modifie suivant la nature et les nécessités de chaque service."

⁸⁹³ The key provisions concerning civil liability under French law according to the *Code Civil* are the following (English translation by Bussani and Palmer in BUSSANI & PALMER (eds.), *Pure Economic Loss in Europe*, *supra* note 47, p. XXIX):

Article 1382: Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.

Article 1383: Each person is liable for the damage which he causes not only by his own act but also by his negligence or imprudence.

Article 1384: He is liable not only for the damage which he caused by his own act, but also for that which is caused by the act of persons for whom he is responsible, or by things which he has in his keeping. [...] Masters and principals [are liable] for damage caused by their domestics and employees in the function for which they have been employed.

For further reference see MARIANNE DONY, "Le Droit Français" in G. Vandersanden and M. Dony (eds.), *La Responsabilité des États Membres En Cas De Violation Du Droit Communautaire* (Bruxelles, Bruylant, 1997), pp. 235 *et seq.*; RENE CHAPUS, *L'administration et son juge* (Paris, Presses universitaires de France, 1999), p. 188; and CHARLES DEBBASCH and FREDERIC COLIN, *Droit Administratif*, 7th ed. (Paris, Economica, 2004), p. 503.

Almost twenty years later, in the famous *Blanco*⁸⁹⁴ ruling, the *Tribunal des Conflits* finally provided an answer to the question of judicial competence for State liability claims in general. As suggested above, the notion of *service public* played a decisive role in the decision-making process. Moreover, the ruling in *Blanco* also forged a distinct public liability regime, which was separate and independent from the private law framework of liability as promulgated in the French Civil Code.⁸⁹⁵

The case itself dealt with a request by Mr. Blanco to hold the State liable according to Articles 1382ff of the Civil Code for damages sustained during the exercise of a public service. The harmed individual, Agnès Blanco, had been run over by a cart owned by the public sector Tobacco Administration, which was crossing the street between different buildings of the State-owned tobacco factory in Bordeaux. The *Tribunal des Conflits*, dealing with the case after referral from the *tribunaux judiciaires*, enunciated the principle of State liability, but explicitly rejected the application of the rules contained in the *Code Civil* relating to tort. Finding that Articles 1382 *et seq.* of the *Code Civil* applied only to relations between private legal entities, the Court ruled that public authorities should not be liable for their actions on the same basis as private individuals.⁸⁹⁶ The Court went on to hold that there was a specific, separate type of responsibility, which purely concerned the relations between the individual and the State.

In sum, in the *Blanco* ruling the *Tribunal des Conflits* proclaimed the newly-founded principle of State liability for public authorities and defined it as:

la responsabilité qui peut incomber à l'État pour les dommages causés aux particuliers par le fait des personnes qu'il emploie dans le service public, ne peut être régie par les principes qui sont établis dans le Code civil, pour

⁸⁹⁴ *Tribunal des Conflits*, 8 février 1873, D., 1873, 3, 17. The text of the judgment can be found in M. LONG *et al.*, *Les grands arrêts de la jurisprudence administrative*, 10th ed. (Paris, Dalloz, 2005), pp. 1 *et seq.* See also JEAN-YVES VINCENT *et al.*, *Droit public général* (Paris, Litec, 2001), pp. 416 *et seq.*

⁸⁹⁵ The *Tribunal des Conflits* established three key principles in the *Blanco* ruling. Apart from the creation of a public liability regime and its corresponding questions of judicial competence, the Court also proclaimed the principle of vicarious liability, which meant that the State was vicariously responsible for the acts of its employees. See *TC*, 8 Feb. 1873, *supra* note 894, p. 17.

⁸⁹⁶ CHAPUS, *L'administration...*, *supra* note 893, p. 30.

*les rapports de particulier à particulier: que cette responsabilité n'est ni générale ni absolue; qu'elle a ses règles spéciales qui varient suivant les besoins du service et la nécessité de concilier les droits de l'État avec les droits privés.*⁸⁹⁷

State responsibility was therefore declared an autonomous regime separate from the general civil law provisions on liability. Being entirely case-law based in origin, the public liability regime developed in the same fashion and has remained in the hands of the judges instead of the legislature. Even today, the rules pertaining to liability for public authorities are for the most part uncoded. The “autonomy” of the regime of State liability, however, does not imply that it bears no resemblance to the regime of private law liability in France. For example, the conditions of liability or the reparation of damage are similar in private law and administrative law.⁸⁹⁸

The question remained, however, of which court was competent to deal with actions concerning liability for official acts and compensation claims. With reference to the principle of separation of powers,⁸⁹⁹ the *Tribunal des Conflits* accorded jurisdiction to the administrative courts to hear actions brought against the State “for loss caused to individuals by the actions of persons whom it employs in the public service [...]”.⁹⁰⁰ Hence in the *Blanco* case a general competence to rule over matters

⁸⁹⁷ TC, 8 Feb. 1873, *supra* note 894, 17: “Considering that the liability which may fall upon the state for damage caused to individuals by the act of persons which it employs in the public service cannot be governed by the principles which are laid down in the Civil Code for relations between one individual and another: that this liability is neither general nor absolute: that it has its own special rules which vary according to the needs of the service and the necessity to reconcile the rights of the state with private rights [...]” English translation as in L. NEVILLE BROWN and JOHN S. BELL, *French Administrative Law*, 5th ed. (Oxford, Clarendon Press, 1998), p. 174.

⁸⁹⁸ DONY, “Le Droit...”, *supra* note 893, p. 236. See also RENÉ CHAPUS, *Droit Administratif Général*, Tome I, 13th ed. (Paris, Montchrestien, 1999), p. 1205, n°1400.

⁸⁹⁹ Law of 16-24 August 1790, which lays down the “*principe de la séparation des autorités administratives et judiciaires*.” On this point see FRANCOISE DREYFUS, “Le débat en France” in J. M. Auby *et al.* (eds.), *Le contrôle juridictionnel de l'administration* (Paris, Economica, 1991), p. 28.

⁹⁰⁰ English translation of the *Blanco* ruling as in FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, p. 288.

concerning the liability of public authorities was accorded - with few exceptions⁹⁰¹ - to the administrative courts.⁹⁰²

The significance of the *Blanco* judgment was not recognized immediately. In fact, it was only at the beginning of the twentieth century that scholars identified the *Blanco* ruling of 1873 as a harbinger of State liability in France and commented upon this remarkable decision. Dickson stated in this context that the *Blanco* ruling heralded a situation where

*[l]e Tribunal des Conflits, le Conseil d'État et la Cour de cassation sont donc aujourd'hui absolument d'accord pour reconnaître, que c'est à la juridiction administrative, et plus exactement au Conseil d'État, juge ordinaire du contentieux administrative, qu'il appartient, en principe, de statuer sur toutes les demandes d'indemnités dirigées contre l'État à l'occasion du fonctionnement des services publics ou à raison des imprudences, des négligences et des fautes de toute sorte imputables au personnel qu'il emploie pour assurer ce fonctionnement.*⁹⁰³

Today it constitutes a rule of thumb that the administrative courts are competent to rule upon disputes, which – broadly speaking - are concerned with relationships of public law (*rappports de droit public*).⁹⁰⁴

⁹⁰¹ Among the matters which remained in the ambit of jurisdiction of the ordinary courts - applying the framework set up in Articles 1382 *et seq.* of the *Code Civil* - were “*la gestion du domaine privé*”, “*le service public de la justice*”, “*le fonctionnement des tribunaux judiciaires*” and “*les services publics industriels et commerciaux*.” In DONY, “*Le Droit...*,” *supra* note 893, p. 236.

⁹⁰² By statute, all vehicle accidents are now excluded from this general rule instead being subject to the competence of the civil courts. If the facts in *Blanco* were to recur, the result would now go the other way. In addition, disputes over indirect taxation and confiscation have been handed over to the ordinary courts. DICKSON, *Introduction...*, *supra* note 882, p. 30.

⁹⁰³ The literature refers to the *Blanco* judgment by the *Tribunal des Conflits* as “*une véritable révolution jurisprudentielle*”; as in CHAPUS, *L'administration...*, *supra* note 893, p. 29. Today the *Tribunal des Conflits*, the *Conseil d'État* and the *Cour de Cassation* all recognise that it is for the administrative courts, and more precisely for the *Conseil d'État*, to hear administrative disputes which appear to be based on damages claims against the State arising from the acts of public bodies or from carelessness, negligence or torts of all kinds which are imputable to civil servants.

⁹⁰⁴ DICKSON, *Introduction...*, *supra* note 882, p. 29. In the *Blanco* ruling the *Tribunal des Conflits* speaks about the “*nécessité de concilier les droits de l'État avec les droits privés*”. See CHAPUS, *L'administration...*, *supra* note 893, p. 15 and pp. 29 *et seq.*

At present, even though the majority of State liability claims still fall within the purview of the administrative courts, the French civil courts have gained jurisdiction over activities as closely linked to the functions of the State as the *police judiciaire*.⁹⁰⁵ Today the *justice judiciaire* is also charged to decide in cases such as accidents caused by vehicles belonging to the administration;⁹⁰⁶ claims concerning “commercial” or “industrial” public services;⁹⁰⁷ certain accidents at school;⁹⁰⁸ certain claims against tax authorities;⁹⁰⁹ cases which entail a flagrant irregularity (*voie de fait*) by the administration infringing a fundamental freedom or a property right;⁹¹⁰ and activities of the judicial organs (*justice judiciaire*),⁹¹¹ including the *police judiciaire*, which is predominantly concerned with the prevention of criminal activity.⁹¹²

c) Two extra-contractual liability regimes: *responsabilité pour/sans faute*

While the existence of the general concept of State liability had been confirmed in the *Blanco* ruling in 1873, the *Tribunal des Conflits* had applied rather restrictive criteria to the concept of public liability.⁹¹³ The State’s liability for its public servants should, according to the *Tribunal des Conflits*, be considered neither a general nor an absolute principle, and it should be based on a distinct set of rules, which are different

⁹⁰⁵ See FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, p. 5. The *Tribunal des Conflits* had already early on in the judgment *Dugave et Bransiet* (*Rec. CE*, 1^{er} suppl., p. 70), declared that ordinary courts did not have the competence to rule upon questions of State liability “*que dans les cas où la connaissance de ces actions leur est attribuée par une disposition particulière de la loi*”.

⁹⁰⁶ Law of 31 December 1957.

⁹⁰⁷ *Tribunal des Conflits*, 22 janvier 1921, *L'Ouest Africain* [1921] *Rec.* 91.

⁹⁰⁸ Law of 5 April 1937.

⁹⁰⁹ In this respect see also CHRISTOPH WOLF, *Die Staatshaftung der Bundesrepublik Deutschland und der Französischen Republik für Verstöße gegen das Europäische Gemeinschaftsrecht (EGV)* (Berlin, Duncker & Humblot, 1999), p. 242, FN 37.

⁹¹⁰ See CHAPUS, *Droit Administratif...*, *supra* note 898, p. 1087.

⁹¹¹ Note that civil courts apply rules of *responsabilité administrative* (and not civil law): *Cass. Civ.* (2^e chambre), 23 novembre 1956, *Dr. Giry*, *AJDA* 1957, p. 91.

⁹¹² Not only do some actions of public bodies go before the ordinary courts, but there are also specific actions against private persons, which may go before the administrative courts (typically contractors undertaking public works). The latter fact is linked to the functional understanding of the *service public* in France.

⁹¹³ WOLF, *Staatshaftung*, *supra* note 909, p. 236.

from the rules on liability under civil law.⁹¹⁴ On the basis of this premise, the *juridiction administrative* developed an elaborate concept of State liability through adjudication, well aware of the fact that it was not generally applicable, but still contained a number of so-called “*îlots de irresponsabilité*”.⁹¹⁵

What were the defining contours of this liability regime? To answer the question four key elements need to be highlighted, which all represent essential attributes of the newly created principle of State liability. These elements relate to its autonomy, its sources, its ambit of application and the general idea behind the system.⁹¹⁶ The notion of autonomy had already been underlined in the *Blanco* ruling, where the *Tribunal des Conflits* advocated a separate regime of State liability independent from the framework of responsibility set up under civil law. The concept of public liability, whose essential contours had emerged from the *Blanco* ruling, was subsequently clarified in the jurisprudence of the *Conseil d'État* partly by analogy to civil law. Over time, the principle continued to grow and develop solely on a case-law basis.⁹¹⁷ Like the principle of non-contractual liability at the Community level, the framework of public liability in France is entirely judge-made; “*loi praetorienne*” as it is often referred to. In fact, after more than 130 years of development in this way, the concept of State liability is now firmly embedded in a rich yet refined jurisprudence.⁹¹⁸

The *ambit* of responsibility for acts of public authorities, in the narrow sense of the word, embraces the entire State apparatus, which in France consists of the *collectivités territoriales* - communes, departments, and regions - and all other public administrative bodies exercising delegated State power. Understood in a wider sense, it also includes all three branches of the State, i.e. the executive, the legislature, and the judiciary. Over time each of these ‘fragments’ of the State found its particular niche under the umbrella concept of liability for acts of public authorities and developed its own defining features, distinct conditions and case-specific

⁹¹⁴ See original text of the *Blanco* ruling in *Tribunal des Conflits*, 8 février 1873, D., 1873, 3, 17.

⁹¹⁵ DONY, “Le Droit...”, *supra* note 893, p. 236.

⁹¹⁶ As in GILLES DARCY, *La responsabilité de l'administration* (Paris, Dalloz, 1996), p. 26.

⁹¹⁷ *Ibid*, p. 27.

⁹¹⁸ *Ibid*, p. 31.

requirements for liability.⁹¹⁹ As for the underlying rationale in *Blanco*, the case provides the classic dichotomy of the public power between the necessity of regulatory action by the State *qua imperium* and its concurrent duty to protect individuals from harm caused by such public acts. By using the general legal concept of liability as a device to mediate between these duties, the case essentially represents the continuing conflict between the individual *versus* the public interest. On the one hand, there is the interest of the individual in receiving compensation for harm. A broader level of reasoning would suggest that there is also a more general interest behind such a scheme of liability in that it serves as a sanctioning mechanism and as a tool for the prevention of future harm. On the other hand, there is the predominant interest of the State in guaranteeing the effective operation of the public service. By the same token, there is a further State interest in ensuring that public authorities are free to act without too great a fear of constantly being called to account for their actions.⁹²⁰

At present, the framework of extra-contractual liability for actions of public authorities in France differentiates between the concept of “*responsabilité pour faute*” and the regime of “*responsabilité sans faute*”.⁹²¹ Essential to the applicable liability regime are the nature and the degree of fault.⁹²² However, both two variants share the same rules with respect to the remaining prerequisites for claiming liability, such as the elements of damage and causality, as well as the issue of reparation. In the following paragraphs, it is the author’s aim to provide the reader with a brief general

⁹¹⁹ Initially, the State liability regime was limited to *actes de gestion* (administrative acts). It was only in the case of *Tomaso Grecco* (CE, 1 février 1905, D.1906.3.81) in 1905 that *actes d'autorité* (mainly governmental acts) were included in its field of application. For a more detailed analysis on the extension of the framework established in *Blanco* to the executive branch see, for example, FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, p. 13. While the issue of public liability for administrative and legislative breaches will only be discussed in a superficial manner in order to provide the reader with a general overview of the system, the crucial question of State liability for judicial violations under French law will be analysed with the necessary attention in the forthcoming paragraphs.

⁹²⁰ DARCY, *La responsabilité...*, *supra* note 916, p. 35.

⁹²¹ Under French law we are confronted with a dual system of non-contractual liability of the State, i.e. a system of State liability for fault (*responsabilité pour faute*) on the one hand and a special liability regime which renders the State liable even where the public authority is guilty of no fault (*responsabilité sans faute*) on the other.

⁹²² BELL *et al.*, *Principles*, *supra* note 873, p. 189. In this context the question of the *nature* of the fault concerns the distinction between personal fault of an agent versus *faute de service*.

overview of the public liability regime in France. The reader should be aware of the fact that the subsequent *excursus* has been included for the sake of completeness with the aim of providing a broad overview of the issues at stake.⁹²³

i) Responsabilité pour faute for administrative acts

The first alternative of the double-sided concept of State liability in France is a fault-based regime, which is in substance rather similar to the general concept of tortious liability contained in Articles 1382ff of the Civil Code. The maxim of responsibility for fault constitutes the theoretical basis for the general regime of liability for all public authorities in France. In practice, however, this concept applies only to acts of administrative and judicial authorities and not the legislature. In terms of fault liability for administrative acts, the notion of *faute de service*⁹²⁴ remains a crucial concept in determining what constitutes an administrative fault.⁹²⁵ In the

⁹²³ For a more detailed analysis of these aspects consult, *inter alia*, BROWN and BELL, *French Administrative...*, *supra* note 897, pp. 182 *et seq*; WOLF, *Staatshaftung*, *supra* note 909, pp. 238 *et seq*.

⁹²⁴ Neither the courts nor the legislature have provided a precise definition of *faute de service*. The concept could, however, be loosely translated as a “malfunctioning of the administrative machinery” (as in FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, p. 102). For further details on the meaning and application of *faute de service* under French law see LATOURNERIE, “France...,” *supra* note 163, p. 205.

⁹²⁵ Under French administrative law, we are faced with a general distinction between ‘*faute personnelle*’ and ‘*faute de service*’. The basic *ratio* is that the public bodies are liable for a ‘*faute de service*’ before administrative courts. A *faute personnelle* committed by a public servant, on the other hand, leads to personal liability of the official in question and the related procedure is within the competence of the ordinary courts. However, since the relevant case law has not yet provided clear, defining guidelines, it remains rather difficult to draw the dividing line between the notions of *faute de service* and *faute personnelle*. A notable attempt to separate the two concepts from one another was presented by Laferrière in his conclusions in the case *Laumonnier-Carriol* (TC, 5 mai 1877, *Rec.*, p. 437): “*Si l’acte dommageable est impersonnel, s’il révèle un administrateur mandataire de l’État plus ou moins sujet à erreur, et non l’homme avec ses faiblesses, ses passions et ses imprudences, l’acte reste administratif et ne peut être déféré aux tribunaux, si, au contraire, la personnalité de l’agent se révèle par des fautes de droit commun, par une voie de fait, par une imprudence, la faute est imputable au fonctionnaire et non à la fonction, et, l’acte, perdant son caractère administratif, ne fait plus obstacle à la compétence judiciaire.*”

There also exists a ‘*droit d’option*’, which is the right for the victim to choose in case of a cumulative occurrence of faults as well as a cumulative occurrence of responsibility. In this case, the victim has the choice between pursuing the official for personal fault in front of the ordinary courts, which will apply the rules of private law, or pursuing the administration as such in front of the administrative courts according to the rules of administrative law. Cf. DEBBASCH and COLIN, *Droit Administratif*, *supra* note 893, p. 506.

relevant case-law, the notion of *faute de service* has generally been interpreted broadly.⁹²⁶

The French definition of the word '*faute*' is not to be equated with the German understanding of '*Verschulden*'⁹²⁷ and in this context also differs substantially from the generic interpretation of 'fault' under English law.⁹²⁸ A definition of the French term *faute* was provided by the *Conseil d'État* in the judgment *Driancourt*, which stated that the condition of fault was already met if one could objectively detect a single substantive illegality with respect to the damaging act in question.⁹²⁹ Under French law, mere illegality is in itself a fault fully capable of inducing liability without the need for any additional qualification of the public act. Under the fault-based framework, liability is invoked whenever an administrative action or act is found to be unlawful.⁹³⁰

Modern French administrative liability is premised upon the parity between public law illegality and administrative fault. The two concepts are so closely intertwined that liability can be invoked whenever an administrative act is found to be illegal.⁹³¹ Just as a legal administrative act can never be wrongful,⁹³² the fact that an act is illegal also automatically implies that it is wrongful no matter what the cause for

⁹²⁶ Initially the maxim of '*faute de service*' was confined to misfeasance. However, over time the concept experienced a gradual expansion in the jurisprudence.

⁹²⁷ As provided for in Article 276 *BGB*.

⁹²⁸ There are fundamental differences in the concept of 'fault' in English and French law. Due to the large number of torts under English law, the wrongdoing which gives rise to liability is conceived differently according to the specific tort which has been invoked by the claimant. Cf. FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, p. 17; *Conclusions Genevois sous CE*, 19 juillet 1981, *Mme Carliez*, *AJDA* 1982, p. 17.103; *CE*, 26 juin 1970, *Bartoli*, *Rec. Lebon*, p. 442; *CE*, 29 septembre 1982, *Mme Vernet*, *Rec. Lebon*, p. 320.

⁹²⁹ *CE*, 26 janvier 1973, *Rec. CE*, p. 78. For further details see BROWN and BELL, *French Administrative...*, *supra* note 897, p. 181.

⁹³⁰ On the notion of *fault* under French liability law see also *Rapport public du Conseil d'État 2005, Considérations générales: Responsabilité et socialisation du risque* (Paris, Études et documents du Conseil d'État, 2005), pp. 232 *et seq.*

⁹³¹ French law presupposes the occurrence of a so-called '*fait illicite*' where it is incumbent on the plaintiff to prove the existence of a fault. This burden, however, is facilitated by the fact that the procedure before the administrative courts is inquisitorial. On the burden of proof see DONY, "Le Droit...", *supra* note 893, p. 239.

⁹³² Cf. FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, p. 18; see also cases listed under FN 928.

its illegality might be.⁹³³ In short, under French liability law for administrative actions the notion of fault is to be equated with public law illegality. In this context the two concepts almost constitute a pleonasm. This principle was reconfirmed by the *Conseil d'État* in its judgment of 26 January 1973, which also abandoned the previous concept of “*erreur d’appréciation non fautive*”.⁹³⁴ From that point on, the *Conseil d'État* upheld the principle that whenever the illegality of an act had been confirmed by a final judgment “*cette illégalité, à supposer même qu’elle soit imputable à une simple erreur d’appréciation, constitue une faute de nature à engager la responsabilité de la puissance publique.*”⁹³⁵

In an exceptional number of cases, a more restricted definition of fault has been applied, though these have become fewer with the passage of time. Especially in those areas where public officials are required to make a particularly difficult judgment,⁹³⁶ a more qualified misconduct is often required in order to invoke liability.⁹³⁷ For these cases, liability presupposes the existence of a qualified fault, i.e. a “*faute lourde*”. On the one hand, the public services concerned tend to operate within certain fields, which are particularly difficult and sensitive, like the police or the fire service.⁹³⁸ The higher threshold of a qualified fault for liability grants these authorities some sort of blanket protection when executing their difficult public duties. On the other hand, the

⁹³³ CHAPUS, *Droit Administratif...*, *supra* note 898, n°1253; *Conclusions Genevois sous CE, Mme Carliez*, *supra* note 928, p. 103.

⁹³⁴ *Ville de Paris/Driancourt*, AJDA 1973, p. 245, *Rev. adm.*, 1974, p. 29, *note Moderne*.

⁹³⁵ The *Conseil d'État* thereby confirmed that such illegality, even assuming that it was the result of a simple error of assessment, constituted a tort which would engage the responsibility of the public body (see the ruling of 6 octobre 1976, *Ministre de l'Agriculture/Epoux Grimard*, *Rec. Lebon*, p. 297). The same principle was confirmed in the judgments of 22 mai 1974, *Sieur Charrois*, *Rec. Lebon*, p. 393 and of 28 mars 1980, *Yverneau*, *RD*, 1980, p. 1744. This principle, however, does not apply to cases where the occurrence of a qualified fault is explicitly required. In this case, the existence of a simple illegality does not suffice to fulfil the requirement of a qualified fault, as confirmed in *CE*, 21 juin 1972, *Foucault*, *Rec. Lebon*, p. 461.

⁹³⁶ BELL *et al.*, *Principles*, *supra* note 873, p. 192.

⁹³⁷ For further details and instances when *faute lourde* is required see CHAPUS, *Droit Administratif...*, *supra* note 898, n°1462 *et seq.*

⁹³⁸ For medical cases the requirement of *faute lourde* was abandoned in the case *CE Ass.*, 10 avril 1992, *Époux V.*

concept of *faute lourde* also applies within particularly delicate areas, for example in respect of tax authorities.⁹³⁹

Apart from the condition of fault, no specific criteria, which would serve to restrict liability, have to be fulfilled, save for the standard requirement of causality between the damage and the act concerned. Finally, in a successful liability claim in these cases the only form of compensation available is monetary damages.⁹⁴⁰

ii) Responsabilité sans faute for loss caused by administrative and legislative acts

The alternative framework of State liability for harm caused by public authorities is a no-fault regime, which is, however, only applicable under particular conditions.⁹⁴¹ The applicability of liability *sans faute* is conceivable in the case that either the public act has not been illegal, or that there is no *faute lourde*, or that under certain circumstances the illegality of the act cannot be established.⁹⁴² Contrary to the concept of *responsabilité pour faute de service* the construct of *responsabilité sans faute* is based upon the idea that the *Conseil d'État* will not question the legality of the impugned public act. Consequently, the effectiveness of the public act concerned remains entirely undisputed.⁹⁴³

The application of this concept has predominantly been based upon two distinct principles: the principle of '*égalité devant les charges publiques*' and the theory of

⁹³⁹ DONY, "Le Droit...", *supra* note 893, pp. 243-245.

⁹⁴⁰ WOLF, *Staatshaftung*, *supra* note 909, p. 238.

⁹⁴¹ On this point, the French approach stands in stark contrast to the restrictive approach of English law. *Responsabilité sans faute* is a concept unknown to English tort law. See FAIRGRIEVE, *State Liability in Tort*, *supra* note 344, p. 18.

⁹⁴² WOLF, *Staatshaftung*, *supra* note 909, p. 252.

⁹⁴³ *Ibid.*, p. 238. The prime example of such liability is damage sustained as a result of the enactment of a law. The CE will never question the legality of such law, but nevertheless award compensation to the harmed individual. As in *CE*, 14 janvier 1938, *Société des produits laitiers La Fleurette*, *Rec. Lebon*, p. 25. In this context see also DANIELE LOCHAK, "Réflexion Sur Les Fonctions Sociales De La Responsabilité Administrative: À La Lumière Des Récents Développements De La Jurisprudence Et De La Législation" in J. Chevallier *et al.*, *Le Droit Administratif En Mutation* (Paris, Presses universitaires de France, 1993), pp. 284 *et seq.* and VINCENT *et al.*, *Droit public*, *supra* note 894, pp. 425 *et seq.*

risk. Firstly, no-fault liability is inextricably linked to the fundamental maxim of equality before public burdens - '*égalité devant les charges publiques*' - which constitutes a core concept under French administrative law.⁹⁴⁴ The rationale underlying this principle is that actions *lawfully* conducted by public authorities, which have been undertaken in the general interest, may nevertheless impose a special burden on a particular individual or a specific group of people. In case the community benefits from a lawful, public act at the expense of an individual, this legal safety net comes into place, which aims to compensate the harmed person for lawfully caused loss. This scenario includes specific cases where damage occurs as a result of (a) legal administrative decisions (individual acts or general regulations⁹⁴⁵), or (b) laws legitimately passed by the legislature, which, however, naturally cause damage to specific individuals.⁹⁴⁶

The second key element is the theory of risk. The main reasoning behind this principle is the fact that activities undertaken by public authorities, even when conducted without fault, may under specific circumstances create an elevated risk for society. If an individual suffers harm after the risk that is attached to such behaviour materializes, the State has to indemnify the victim irrespective of whether the authorities' actions were wrongful or not. In short, the application of *responsabilité sans faute* covers different areas of public sector activity.⁹⁴⁷

No-fault liability for administrative and (as will be shown later) legislative acts should generally be considered as an exceptional device used by the courts to ensure equitable justice. The crux of this concept is to grant compensation for loss even though the illegality of the respective public act cannot or ought not to be ascertained. This form of liability allows compensation to be awarded to an individual in return for

⁹⁴⁴ "Equality before public burdens" as translated in BELL *et al.*, *Principles*, *supra* note 873, p. 194; similar BROWN and BELL, *French Administrative...*, *supra* note 897, p. 198.

⁹⁴⁵ See, for example, CE, 30 novembre 1923, *Couitéas Rec. Lebon*, p. 789; CE, 28 octobre 1949, *Société des Ateliers du Cap Janet, Rec. Lebon*, p. 450; CE, 11 mai 1984, *Port autonome de Marseille, Rec. Lebon*, p. 178 as well as CE, 22 février 1963, *Comune de Gavarnie, RPD*, 1963, note J. Waline.

⁹⁴⁶ DONY, "Le Droit...", *supra* note 893, p. 249. For more details see also DEBBASCH and COLIN, *Droit Administratif*, *supra* note 893, p. 529.

⁹⁴⁷ For examples see DARCY, *La responsabilité...*, *supra* note 916, p. 96.

the ‘sacrifice’ he has made for the benefit of the public interest.⁹⁴⁸ It is also tied to the individual’s exposure to risk-related behaviour exercised by the State.

However, the regime of liability *sans faute* has been subjected to rather restrictive prerequisites for its application, which may be to the detriment of the victim. Within the context of no-fault liability, the individual’s right to reparation is conditioned by the need to prove the existence of a specific and severe damage amounting to an abnormal burden.⁹⁴⁹ *Specific* is to be understood as affecting only particular members of society. *Abnormal* presupposes the existence of damage with such a degree of severity that it lies beyond the inconveniences we experience in everyday life.⁹⁵⁰ However, the no-fault regime is generally not applicable if the authority in question has excluded the right to compensation from the outset.⁹⁵¹ As stated above, in this context one has to distinguish between two different scenarios: no-fault liability for legislative acts and liability *sans faute* for administrative acts.⁹⁵²

The first prerequisite for responsibility *sans faute* for actions undertaken by the *autorités administratifs* is the occurrence of a specific and severe damage that has been inflicted upon an individual for reasons of public interest. It is difficult to describe systematically how the *Conseil d’État* classifies the notion of abnormal burden and the definition of public interest. In addition, the jurisprudence so far has not provided a standard definition of what constitutes a severe damage. It seems that the *Conseil d’État* follows a case-by-case approach in that it takes into account the different circumstances of every single case before it arrives at a final decision.⁹⁵³ The

⁹⁴⁸ See WOLF, *Staatshaftung*, *supra* note 909, pp. 238 *et seq.*

⁹⁴⁹ “[P]réjudice anormal et spécial”; Cf. DARCY, *La responsabilité...*, *supra* note 916, p. 102; WOLF, *Staatshaftung*, *supra* note 909, p. 252.

⁹⁵⁰ See DARCY, *La responsabilité...*, *supra* note 916, p. 102 and DONY, “Le Droit...”, *supra* note 893, p. 248.

⁹⁵¹ This is frequently the case with legislative actions (oldest example: *La Fleurette*, *supra* note 943).

⁹⁵² WOLF, *Staatshaftung*, *supra* note 909, p. 238. In fact, as early as in 1923 the *Conseil d’État* was confronted with a case where it seemed best to leave aside the question of legality. This was in the decision *Couitéas* (CE, 30 nov. 1923). Being confronted with a situation where the Court did not want to rule on the legality of a specific administrative act, the CE – applying the principle of equality in dealing with public burdens – awarded a remedy on the basis of ‘*responsabilité sans faute*’. Cf. BROWN and BELL, *French Administrative...*, *supra* note 897, p. 198.

⁹⁵³ WOLF, *Staatshaftung*, *supra* note 909, p. 262.

only element which is not required in order to invoke liability *sans faute* is proof of illegality of the public act. Moreover, the only form of compensation available in these cases is monetary damages.

With respect to the question of State liability for *legislative acts* the situation in France is rather peculiar. Generally speaking, the *Conseil Constitutionnel* has the power of legislative review only *before* the enactment of a specific law. No other court is competent to review legislative acts. As a result, courts in France are simply not able to rule upon the illegality of a validly enacted legislative provision due to its incompatibility with the Constitution.⁹⁵⁴ In the case of loss caused to an individual by a legislative act, the *Conseil d'État* was therefore confronted with an insoluble dilemma. While it had no power to decide on the legality of legislative acts, it also could not find that there was no responsibility on the part of the legislature because of the obvious harm that had been inflicted upon an individual as a result of the act concerned.

In its *La Fleurette* decision,⁹⁵⁵ the *Conseil d'État* – in an attempt to resolve the stalemate - implemented an ‘emergency solution’, which involved the introduction of an alternative concept to the conventional framework of *responsabilité pour faute*. The newly created regime of responsibility of the State in its function as legislature was again based on the principle of equality before public burdens, and provided compensation to the affected individual without having the Court decide explicitly on the illegality of the act concerned. The regime of no-fault liability offered a viable solution to bypass the question of illegality (and fault), but still guaranteed the

⁹⁵⁴ In France there is no *ex-post* review of legislative acts for compatibility with the Constitution. According to Article 61 of the French Constitution, the *Conseil Constitutionnel* can only review legislative acts *ex ante*, i.e. before they enter into force. As a consequence, it is impossible for a court in France to refer a legislative act, which is used in an on-going trial, to the *Conseil Constitutionnel* for constitutional review. On this point see, for example, DAVID DOKHAN, *Les limites du contrôle de la constitutionnalité des actes législatifs* (Paris, LGDJ, 2001).

⁹⁵⁵ In this case, the dairy company *La Fleurette* experienced special hardship due to an Act passed by the legislature, which sought to protect the dairy market by prohibiting the manufacture and the marketing of all sorts of dairy products which could substitute cream where such products contained ingredients other than milk. Hence, the *Conseil d'État* recognized liability in damages for loss caused to the company. The judgment was based on the principle of equality in bearing public burdens. For further details see *La Fleurette*, *supra* note 943. On this case in the context of EC law, see also BARAV, "State Liability...", *supra* note 99, pp. 112 *et seq.*

claimant his or her right to compensation in case of specific and severe loss caused by a legislative provision. The *ratio* of the regime was also based on the principle of equality before public burdens.⁹⁵⁶ In short, the concept of *responsabilité sans faute* was originally born out of the need to tackle the problem of State liability for legislative acts.⁹⁵⁷

Given the fact that laws naturally tend to have a rather general scope of application, the condition of *specificity* of the damage, which is required in this context, is difficult to establish. Moreover, State liability for legislative breaches can never be incurred by an omission or inaction of the legislature.⁹⁵⁸ And, as stated above, this principle is also inapplicable in cases where the framers of the law have explicitly excluded any right to compensation.⁹⁵⁹ Yet with respect to cases of State liability for legislative breaches, the basic construct of liability *sans faute* prevails today.

This brief overview on the origin and the development of the two forms of liability leaves unanswered the question of how to view their relationship to one another. In general, liability *sans faute* is to be regarded as an exceptional regime of liability, which may only be invoked if liability based on fault cannot be established. Hence, liability *pour faute* has priority while the secondary regime of liability *sans*

⁹⁵⁶ The same is applicable for international conventions, which have been incorporated into national law. See judgment of 30 mars 1966, *Cie générale d'énergie radio-électrique*, *Rec. Lebon*, p. 582.

⁹⁵⁷ There are two exceptions to the general principle of invoking liability due to a violation of the principle of equality before public burdens. Firstly, cases which are deliberately discriminatory and which naturally favour one group over another are not susceptible to liability claims. In this context see, for example, *CE*, 10 janvier 1992, *Commune de Blanquefort*, *Droit fiscal*, 1992, p. 1158. The second exception envisages the case where a public act aims to protect a general and pre-eminent interest, such as public health, national defence, protection of the national economy as a whole or environmental protection. See, *inter alia*, *CAA Lyon*, 10 octobre 1990, *JCP*, 1991, II, 21761. The argument of protection of the general interest frequently leads to the refusal of compensation in the field of public economic interventionism in the form of legislation or administrative acts, such as price control or market regulation. On this aspect see *CE*, 15 juillet 1949, *Ville d'Elbeuf*, *Rec. Lebon*, p. 359.

⁹⁵⁸ The same problem arises with respect to the non-transposition of a Community directive by the national legislature. See *DONY*, "Le Droit...", *supra* note 893, p. 252.

⁹⁵⁹ This was clarified in the decision *CE*, 25 janvier 1963, *Bovero*, *Rec. Lebon*, p. 53. Until then the general perception was that compensation could only be demanded if such a possibility was intended by the legislature.

faute can only be invoked in case of non-existence of a fault.⁹⁶⁰ Moreover, these liability regimes are mutually exclusive. Finally, it is worth mentioning that liability *sans faute* has to be invoked *ex officio* by the judge on his or her own motion in the interest of the victim after he or she has been refused compensation on the basis of liability *pour faute*.⁹⁶¹

There are three decisive rules of thumb when distinguishing the regime of no-fault liability from the principle of liability *pour faute*. First, in the case of the more restrictive regime of no-fault liability, damage is only reparable if it reaches a certain level of gravity. Under the framework of liability *pour faute*, any damage is reparable. Second, in the case of no-fault liability the victim does not have to prove the occurrence of a fault, simply the existence of a causal link between the damage sustained and the act of the public authority. Third, with respect to liability *sans faute*, there are only two reasons that could possibly reduce the liability of public authorities, i.e. *force majeure* and contributory negligence by the victim.⁹⁶²

2. The principle of State liability for judicial breaches

In line with this general trend, the judiciary was eventually confronted with growing pressure to face responsibility for its actions. The ‘*service public*’ today is faced with the challenge of assuring every citizen’s right to a well-functioning, day-to-day service provided by the public authorities. In order to satisfy demands for transparency and accountability for public actions, not only the administration, but also the judiciary has introduced various solutions by legislative reform or through the jurisprudence of its supreme courts.⁹⁶³ Under French law the assessment of State liability for judicial breaches of law emanates from either the ‘*juge judiciaire*’ or the ‘*juge administrative*’ depending on whether the damage has been caused by the ‘*justice judiciaire*’ or the ‘*justice administrative*’.

⁹⁶⁰ DONY, "Le Droit...", *supra* note 893, p. 249. See also CHAPUS, *Droit Administratif...*, *supra* note 898, p. 1344, n°1514.

⁹⁶¹ WOLF, *Staatshaftung*, *supra* note 909, p. 241.

⁹⁶² DEBBASCH and COLIN, *Droit Administratif*, *supra* note 893, p. 523.

⁹⁶³ *Ibid*, p. 556.

a) The principle of State liability incurred by the *Justice Judiciaire*

The development of a general framework of State liability for harm incurred by the ordinary judiciary, i.e. the *justice judiciaire*,⁹⁶⁴ can roughly be separated into four different phases. At first there was no such regime. Similar to the situation we initially encountered in England and Wales,⁹⁶⁵ the French State enjoyed absolute immunity when it came to liability claims for violations incurred by the judiciary. Over time, however, the shield of protection slowly started to crumble, mainly due to judicial activism, which finally elevated the process to a second stage. Starting with its judgment in *Giry*,⁹⁶⁶ the *Cour de Cassation* introduced a first exception to the ruling principle of State immunity and created an interim regime of State liability, which was marked by a framework of liability *sans faute*. It took the legislature until 1972 to catch up with the emerging judicial trend towards holding the State liable for breaches of law by its judicial organs.

The *Loi de 5 juillet 1972*⁹⁶⁷ constituted the starting point of a third stage in the development of State liability for breaches committed by the *justice judiciaire*. This particular period was distinguished from the two previous phases in the sense that it provided the first legislative recognition of the extension of the existing regime of State liability to include the (ordinary) judiciary as a possible tortfeasor. In 2006, an amendment to this law completed the evolution of the system. The following paragraphs will provide for a more detailed and chronological analysis of the long-winded road which lead towards the contemporary regime of State liability for violations caused to an individual by the *justice judiciaire*.

⁹⁶⁴ For a definition of the French terminology of '*justice judiciaire*' and '*justice administrative*' see FNS 872 and 873.

⁹⁶⁵ For the development of public liability in England and Wales, see chapter III, pp. 77 *et seq.*

⁹⁶⁶ *Cass. Civ., Giry, supra* note 911.

⁹⁶⁷ See also J.-M. AUBY, "La Responsabilité de l'État en matière de Justice Judiciaire (l'article 11 de la loi n°72-626 du 5 juillet 1972)" (1973) *A.J.D.A.* 1, pp. 4-12.

i) *The framework of liability for acts of the judiciary before the Law of 5 July 1972*

Unless the liability of the State was explicitly prescribed by law, the French State remained largely behind an uncoded shield of protection against liability claims brought by individuals for violations incurred by the ordinary judiciary. Since this principle had not been codified, customary law remained the guarantor for such quasi-immunity of the State with respect to such claims. It rendered the State irresponsible for any violations of such sort. The *jurisprudence judiciaire* gave the principle of non-accountability a wide field of application, in that it embraced not only judicial acts as such, but also different activities adhering to the administration of justice.⁹⁶⁸ The adoption of the State's quasi-immunity with respect to judicial breaches had generally been justified on the basis of three main objectives. First, the argument was used that a possible regime of State responsibility for judicial breaches would gravely interfere with the principle of State sovereignty as well as the maxim of judicial independence and the retention of judges' freedom of thought and protection from outside pressures. The second objection to a general liability regime of the State was a procedural one, based on the fact that instead of a liability action, the individual would always have the possibility to challenge a judicial decision through appeal to a higher court. Finally, it was argued that the indirect revision of a judgment in the course of an action for liability would violate the fundamental principle of *res judicata*.⁹⁶⁹

The force of these arguments meant, there were only a handful of exceptions to the wide-reaching immunity of the State with respect to liability claims for judicial violations. Traditionally, the principle of State liability was only applicable in fields where special legislation foresaw such a possibility for the claimant.⁹⁷⁰ Overall, this

⁹⁶⁸ MICHEL FROMONT, "La responsabilité de l'Etat pour le comportement illégal de ses organes" in H. Mosler (ed.), *Haftung des Staates für rechtswidriges Verhalten seiner Organe: Länderberichte und Rechtsvergleichung; Internationales Kolloquium veranstaltet vom Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, 1964* (Köln, Carl Heymanns Verlag KG, 1967), p. 178.

⁹⁶⁹ COMPERNOLLE and CLOSSET-MARCHAL, "La responsabilité...", *supra* note 866, p. 418.

⁹⁷⁰ FROMONT, "La responsabilité...", *supra* note 968, p. 178. See also CANIVET, "Responsibility...", *supra* note 192, p. 32.

accounted for a rather limited, but yet specific number of cases.⁹⁷¹ In the field of criminal or correctional justice, the cases of '*erreur judiciaire*' and '*détention provisoire injustifiée*' marked two noteworthy exceptions to the general immunity scheme of the State in France. At present, both of these cases which still constitute exceptions to the general regime of State liability are regulated under French criminal law. The first falls under the rubric of revision of criminal judgments. As mentioned before, reparation for judicial errors in criminal law is a feature we find not only in most of the countries included in group III of our classification scheme but in our entire study. In Finland, another Member State classified under group III, a similar mechanism has been established by the Finish Act on Compensation from State Funds for the Arrest or Detention of an Innocent Person (Act No. 422/1974).⁹⁷² Similar frameworks are applied even in those Member States, which usually exclude entirely the concept of State liability for judicial breaches.⁹⁷³ In France such instrument has first been established in the *Loi du 8 Juin 1895* following the *Dreyfus* case.⁹⁷⁴ According to this law, a defendant, who had obtained revision of his case, was eligible for some kind of indemnity, which would be awarded in the same appeal court decision. Today the case of an erroneous criminal conviction is regulated by Article

⁹⁷¹ As an aside, it is worth mentioning that besides the harsh restrictions on the liability of the State for judicial breaches, the instrument of personal liability of judicial officers could be invoked under the conditions and the procedure of '*la prise à partie*'. *La prise à partie* constituted the procedure under French law by which an individual could claim all injurious consequences resulting from personal fault of a judge in cases when he/she had committed an act of fraud, defalcation, or he/she acted in gross negligence, which amounts to a denial of justice. Article 505 *et seq.* of the old Code of Civil Procedure regulated the procedure and listed the cases when personal liability of a judge could be invoked. In short, this long and costly procedure would allow to claim personal liability of judges (*magistrats judiciaires*) in case of fraud, peculation, denial of justice and gross fault on their behalf. Since the law of 7 February 1933 personal liability could also arise for '*faute lourde professionnelle*'. Overall, the procedure was risky and complex. In the *Loi du 7 février 1933* the personal responsibility of the judge was substituted for the responsibility of the State and consequently, the regime of reparation from then onwards concerned indirectly the State. The procedure of *la prise à partie* had never been successful when directed against a judge, but could also be invoked against agents who did not perform any type of judicial act as such, but who were only dealing with auxiliary judicial work. The procedural device of *la prise à partie* was finally abolished by the *Loi du 5 juillet 1972*. Contrary to France, an equivalent procedure still exists in Belgium (see chapter VI).

⁹⁷² For further examples see graph on p. 306.

⁹⁷³ See graph on p. 168 of the study outlining the situation in countries pertaining to group I.

⁹⁷⁴ In FROMONT, "La responsabilité...", *supra* note 968, p. 178. On this issue see also DONY, "Le Droit...", *supra* note 893, pp. 246 *et seq.*

626 of the *Code de Procédure Pénale*,⁹⁷⁵ which provides for the revision of the case by the *Cour de Cassation* and awards effective remedy and reparation of damages for the victims of the conviction.

Moreover, individuals who have been subject to unjustified detention on remand (*détention provisoire injustifiée*) are granted compensation by the State according to the procedure foreseen in Articles 149 and 150 of the *Code de Procédure Pénale*.⁹⁷⁶ Under these provisions, the State guarantees compensation without a pre-condition of fault for those individuals who – after having been placed in pre-trial detention – benefit from either a suspension of their case, or from exculpation or acquittal. Initially, the victim was required to prove that his or her detention had caused exceptionally serious harm “*manifestement anormal et d’une particulière gravité*”.⁹⁷⁷ However, this requirement was repealed in the law of 30 December 1996 concerning detention on remand (Article 9). Finally, the law of 15 June 2000 also provided for a revision of the procedural regime. Instead of the previous procedure of submitting requests directly to a commission linked to the *Cour de Cassation*, the claims now have to be addressed to the presidents of the *cours d’appels*, whose decisions may be appealed to a special body called ‘*Commission nationale de réparation des detentions provisoires*’. Overall, the State is in charge of providing compensation, but has the right of recourse against those individuals whose false testimony was at the origin of the detention on remand.⁹⁷⁸

⁹⁷⁵ Article 622 *et seq.* of the Criminal Procedural Code. On this issue see R. KOERNIG-JOULIN, “L’indemnisation des victimes d’erreurs judiciaires: la réforme nécessaire de l’article 626, alinéa 3, du Code de procédure pénale” in J.-L. Aubert et al., *Le juge entre deux millénaires: Mélanges offerts à Pierre Drai* (Dalloz, 2000), pp. 65 *et seq.*

⁹⁷⁶ Articles 149 and 150 *Code de Procédure Pénale* (originated from the law of 17 July 1970 and last amended in the law of 15 June 2000, Articles 70 and 71, and the law of 30 December 2000).

⁹⁷⁷ *Ibid.*

⁹⁷⁸ A number of exceptions, which allowed for liability claims to be brought forward against the State for violations committed by the judicial authorities, and which had to be explicitly stipulated by law, also included the *Loi du 14 décembre 1964* concerning civil tutelage. This law instituted the responsibility of the State for any type of fault in cases of damage sustained by the person under tutelage, which was committed by the competent judge (*le juge des tutelles*). The claim is dealt with before the *Tribunal de Grande Instance* (see, for example, *Civ.*, 26 juin 1979, *Consorts Morineau*, *Gaz. Pal.*, 2 janvier 1981).

ii) *An interim regime of State liability sans faute introduced by the jurisdiction of the Cour de Cassation*⁹⁷⁹

The fact that the law was silent on the customary principle of irresponsibility of the State with respect to judicial breaches finally spurred the courts to challenge this unwritten dogma. In a judgment of 23 November 1956 in the case *Giry*,⁹⁸⁰ the *Cour de Cassation* formally introduced – “*sur base des principes généraux qui commandent tout à la fois le droit public et le droit privé*” – a regime of State liability *sans faute* with respect to activities of the *police judiciaire*,⁹⁸¹ which was based and founded on the principle of equality in front of public burdens. Consequently, apart from the traditional cases of liability, which were explicitly stipulated by law, the ordinary courts also had the competence to rule on the liability of the State by applying the general rules of liability of public authorities.⁹⁸²

The specific case concerned an individual, Dr. Giry, who had assisted in an operation conducted by the *police judiciaire* in his professional capacity and who had been injured in an explosion, which occurred in the course of this police investigation. Subsumed under the general definition of *collaborateur occasionnel des services publics*, Dr. Giry was able to benefit from a strict responsibility regime such as the one generally applied in the jurisprudence of the administrative courts.⁹⁸³ The *Cour de Cassation* went on to confirm the decision taken in *Giry* in various subsequent

⁹⁷⁹ COMPERNOLLE and CLOSSET-MARCHAL, “La responsabilité...,” *supra* note 866, p. 420.

⁹⁸⁰ *Cass. civ. (2^e ch.)*, 23 nov. 1956.

⁹⁸¹ As defined in GUILLIEN and VINCENT, *Lexique...*, *supra* note 872, p. 471, the *police judiciaire* consists of “*fonctionnaires de la police nationale, de la gendarmerie et certaines autres personnes nommément désignées ayant pour mission de constater les infractions, d’en établir la preuve, d’en identifier les auteurs et d’exécuter, une fois l’information ouverte, les délégations des juridictions d’instruction*.” In short, contrary to the *police administrative*, the activities of the *police judiciaire* are essentially focused on criminal investigation and the apprehension of offenders.

⁹⁸² Accordingly, the *Cour de Cassation* ruled that in cases concerning public authorities it was for the ordinary courts to apply the general rules pertaining to the public power: “[L]e pouvoir et le devoir de se référer [...] aux règles du droit public.” See also CHAPUS, *L’administration...*, *supra* note 893, p. 192. In the *Giry* judgment the *Cour de Cassation* announced with respect to the “*principes régissant la responsabilité de la puissance publique*” that the legal provisions contained in the Civil Code were inapplicable to disputes involving public authorities and that the ordinary courts had the power and duty to apply the rules pertaining to public law (“*le pouvoir et le devoir de se référer [...] aux règles du droit public*”). See *Cass. Civ., Giry*, *supra* note 911.

⁹⁸³ CHAPUS, *Droit Administratif...*, *supra* note 898, p. 1274.

judgments, which concerned either (a) damage caused by the use of dangerous weapons and firearms (“*armes ou d’engins dangereux*”)⁹⁸⁴ or - as in the case of *Giry* - (b) damage inflicted upon occasional collaborators of the public service area (“*collaborateurs des services publics*”).⁹⁸⁵ However, it was predominantly in the ambit of activities of the *police judiciaire* that the courts seized the opportunity to debate and elaborate on the underlying principles of responsibility, which were grounded in the jurisdiction of the administrative courts.⁹⁸⁶ The Court, for example, engaged in a similar rhetoric and reasoning in the ruling *Polès* of 24 November 1965. It set aside the rules of “*la prise à partie*” and further developed a completely autonomous theory on State liability with respect to acts performed by the *police judiciaire*.⁹⁸⁷ In sum, the above-mentioned cases are illustrative of the fact that even before the adoption of the new law in 1972, a modified framework of liability had been construed in the jurisprudence of the *Cour de Cassation*, which was applicable in at least two areas, i.e. for all damage caused by acts of the *police judiciaire*⁹⁸⁸ and for activities pertaining to the pre-trial phase of ‘*instruction préparatoire*’.⁹⁸⁹

However, it was evident that these specific cases remained exceptions and that the liability regime *sans faute* was only applicable within very narrow confines. Moreover, these cases concerned acts which were not ‘proper’ judicial acts as

⁹⁸⁴ As mentioned in *Ibid*, p. 1274: *Civ. (1^{re} ch.)*, 10 juin 1986, *cons. Pourcel*, JCP 1986, n°20683, *rapp. Sargos*, *RFDA* 1987, p. 92, *note Buisson*: “[...] usage d’une arme à feu, ayant provoqué le décès d’une personne, au cours d’une opération de police judiciaire.”

⁹⁸⁵ As enlisted in *Ibid*, p. 1274: *Civ. (1^{re} chambre)*, 30 janvier 1996, *Morand*, D 1997, p. 83, *note A. Legrand*. See also PIERRE BON, “La responsabilité de l’État envers les auxiliaires de justice (suite). Observations sur l’arrêt de la cour d’appel de Paris du 3 décembre 1997, *Morand c/ Agent judiciaire du Trésor*” (1999) 15 *Revue Française de Droit Administratif*, pp. 399-402. The Annex of this article contains a judgment by the *Cour de Cassation*, *Cass. civ. (1^{re} ch.)*, 13 octobre 1998, *M. et autres c/ Trésor*, which underlined the fact that the lawyer in the proceedings representing one of the parties was not to be classified under the general notion of *collaborateur du service public*. Instead, lawyers in the proceedings are tied to the State responsibility regime stipulated under Article L.141-1 *Code de l’Organisation Judiciaire*.

⁹⁸⁶ Examples of this line of cases are: *Civ. (1^{re} ch.)*, 15 novembre 1996, *Bogdan*, DA 1997, n°32; Bordeaux, 9 mars 1967, *Issartier*, D 1968, p. 365; *TGI Seine*, 13 mai 1970, *Vavon*, AJ 1970, p. 508; Paris, 6 juillet 1990, *Sacerdot*, D 1990, IR, p. 237 *et al.*

⁹⁸⁷ *Civ. (2^e chambre)*, 24 novembre 1965, *Polès*, D. 1966, *somm.*, p. 61, G. Pal. 1966.1.195.

⁹⁸⁸ See aforementioned cases under FN 985.

⁹⁸⁹ For reference see, for example, *Cass. civ. (2^e ch.)*, 19 juin 1969, *Bull. Civ.*, II, n°225 (*affaire Naillat*) and *Cass. civ. (2^e ch.)*, 29 nov. 1973, *Bull. civ.*, II, n°316 (*affaire Benyaich*); also discussed in COMPERNOLLE and CLOSSET-MARCHAL, “La responsabilité...,” *supra* note 866, p. 420.

understood in the classical, narrowly defined sense of the word. All other instances were premised on the assumption that State liability for judicial breaches could only be invoked if explicitly provided for by law or on the basis of the procedure of *la prise à partie*, within which the State only acted as the financial guarantor for personal fault of a judicial organ and not for fault committed by the judiciary as a collective body.⁹⁹⁰ In sum, until 1972 the situation in France was characterized by a general principle of non-accountability of the State with respect to judicial breaches, which was tempered by two legislative exceptions⁹⁹¹ and the slow but progressive evolution of the jurisprudence in this context.

Despite the codification of the issue in 1972 prescribing that State liability for the malfunctioning of the judicial authorities was tied to the occurrence of a *faute lourde* or a denial of justice,⁹⁹² the *Cour de Cassation* consistently followed its previously established line of jurisprudence. Thus, if one refers – like the *Cour de Cassation* in the judgment *Giry* – to the “*règles du droit public*”,⁹⁹³ the responsibility of the State could still also be invoked in the absence of fault (for instance in cases of use of dangerous firearms) or in the case of *faute simple*. The interpretation of the rather woolly legislative provision was such that it allowed for the exclusion of all acts conducted by the *police judiciaire* outside the confines of its field of application.⁹⁹⁴ Hence, the jurisprudence of the ordinary courts further triggered the evolution of the rules pertaining to public authorities, i.e. with respect to special operations by the *police judiciaire*, for which the regime of State liability *sans faute* still applied.⁹⁹⁵ The application of these rules in the aforementioned case of *Giry* would have prevented the latter from benefiting from the regime of responsibility without fault, which had been instituted by the jurisprudence on administrative

⁹⁹⁰ Ibid, p. 420.

⁹⁹¹ For details on the two legislative exceptions see above pp. 257 *et seq.*

⁹⁹² See in particular the enactment of Article 11 of the Law of 5 July 1972.

⁹⁹³ Cass. Civ., *Giry*, *supra* note 911.

⁹⁹⁴ CHAPUS, *L'administration...*, *supra* note 893, p. 193. See also P. WEIL, “A propos de l’application par les tribunaux judiciaires des règles du droit public ou: les surprises de la jurisprudence *Giry*” in *Mélanges Charles Eisenmann* (Paris, Cujas, 1975), p. 379.

⁹⁹⁵ See *Pourcel*, *supra* note 984.

matters favouring occasional collaborators of the public services. From then on, the *Cour de Cassation* would constantly reaffirm this line of jurisprudence. While an important evolution in the jurisprudence was emerging, it was the turn of the legislature to finally address the problem.

iii) *The regime of State liability introduced by the Law of 5 July 1972*⁹⁹⁶

The *Loi du 5 juillet 1972* established an overarching principle of State liability for judicial breaches and covered the entire *justice judiciaire*. Article 11 of the law provided that “[l]’État est tenu de réparer le dommage causé par le fonctionnement défectueux du service de la justice.” Entirely abandoning the old principle of non-accountability of the State with respect to judicial acts,⁹⁹⁷ Article 11, which regulated from then on the State’s responsibility for harm inflicted upon individuals by a malfunctioning of the *justice judiciaire*. Article 11, which was later reformulated in Article L.781-1 of the Courts of Justice Act,⁹⁹⁸ declared in a general manner that the State was held to repair the damages caused by the malfunctioning of the (ordinary) judicial branch. However, the legislature immediately qualified this principle by specifying that, if the State was bound to repair the damage which occurred as a result of the malfunctioning of the judiciary, this responsibility could only be invoked under the occurrence of *grave fault* or *denial of justice*.⁹⁹⁹ The legal provision was later reformulated in Book 7 of the *Code de l’Organisation Judiciaire*. Under the heading of Title VIII, “Liability for defects in the functioning of the judicial power”, Article L.781-1 read as follows: “The State shall be liable for the damage caused by defects in the functioning of the judicial power. Such liability is engaged only upon gross negligence or a denial of justice [...]” It further declared that “[t]he State shall

⁹⁹⁶ COMPERNOLLE and CLOSSET-MARCHAL, “La responsabilité...,” *supra* note 866, p. 421.

⁹⁹⁷ Article 11 paragraphs (2) and (3) of the law of 5 July 1972 also regulated the personal fault by judges: “La responsabilité des juges en raison de leur faute personnelle est régie par le statut de la magistrature... L’État garantit les victimes des dommages causés par les fautes personnelles des juges et autres magistrats, sauf son recours contre ces derniers”. See *Ibid*, p. 424.

⁹⁹⁸ The translation of the *Code de l’organisation judiciaire* as “Courts of Justice Act” is used accordingly in VAN GERVEN *et al.*, *Tort Law...*, *supra* note 340, p. 372.

⁹⁹⁹ “[C]ette responsabilité n’est engagée que par une faute lourde ou par un déni de justice.” On this question see COMPERNOLLE and CLOSSET-MARCHAL, “La responsabilité...,” *supra* note 866, pp. 413 *et seq.*

assume the burden of liability towards the victims of injury caused by the personal fault of judges and other magistrates, without prejudice to its recourses against them.”¹⁰⁰⁰ The aforementioned provisions were recently reiterated and re-codified in Articles L.141-1 and L.141-2 *Code de l’Organisation Judiciaire*.¹⁰⁰¹ However, with respect to their content the norms remained unaltered.¹⁰⁰²

While the law of 1972 and particularly its Article 11 outlined the general pillars of such liability, it remained silent on issues such as the question of competence to rule upon such liability claims, the precise interpretation of the notions of grave fault and denial of justice, the ambit of applicability of the law, and its relation to the existing case-law of the *Cour de Cassation* on the issue. Therefore, the following paragraphs will lay out a more expansive conceptualization of the substance, content and the questions, which were seemingly left unanswered by the legislative provisions.

iv) The regime of liability created by the Loi du 5 Juillet 1972

The legislature overtly sought to exclude the creation of a liability regime *sans faute* in this particular context and severely limited the number of possible actions for compensation. With this objective in mind, a liability regime based on fault was implemented. Moreover, the legislature was not satisfied with the occurrence of a simple fault, but instead insisted on a qualified fault as a pre-condition in order to engage the responsibility of the State. The *travaux préparatoires* of the law of 1972 appear to indicate that the imperative concept of ‘*faute lourde*’ was to be interpreted according to the meaning attributed to it under administrative law. Thereby, it seems

¹⁰⁰⁰ Translation by P. Larouche in VAN GERVEN *et al.*, *Tort Law*, *supra* note 238, p. 383.

¹⁰⁰¹ See Article L.781-1 *Code de l’Organisation Judiciaire* (Abrogé et partiellement recodifié, Ord. n° 2006-673, 8 juin 2006, art. 1er.-V.COJ, art. L.141-1 et L.141-2).

¹⁰⁰² Article L.141-1 reads as follows: “L’État est tenu de réparer le dommage causé par le fonctionnement défectueux du service de la justice. Sauf dispositions particulières, cette responsabilité n’est engagée que par une faute lourde ou par un déni de justice.”

Article L.141-2: “La responsabilité des juges, à raison de leur faute personnelle, est régie: - s’agissant des magistrats du corps judiciaire, par le statut de la magistrature; - s’agissant des autres juges, par des lois spéciales ou, à défaut, par les articles 505 et suivants du Code de procédure civile. L’État garantit les victimes des dommages causés par les fautes personnelles des juges et autres magistrats, sauf son recours contre ces derniers.”

to be covering a larger field of application than the notion of “*faute lourde professionnelle*”, which had been previously employed in the law of 7 February 1933 as an example for the causes, which conditioned the successful inception of *la prise à partie*.¹⁰⁰³ According to the wider interpretation, the notion of *faute lourde* not only embraces instances of perfidy, fraud and corruption, but also those acts, which were committed with particularly severe fault or gross negligence, in a manner that an assiduous judicial officer would never act.

According to the newly established law, the party bringing the claim of liability also carried the burden of proof of the alleged fault by the judicial officer. It was then for the judge to rule upon the question of whether the judicial service had in fact been malfunctioning. Consequently, the judge could oblige the State to repair the damages caused by the wrongful act. Recent jurisprudence in the field, though rather scarce, gives reason to believe that today the notion of *faute lourde* is to be interpreted in a fairly restrictive sense. This in turn forms the crux of the argument, which attempts to account for the fact that until today the majority of asserted claims for liability in front of ordinary courts tend to fail or are simply dismissed.

v) *The Loi du 5 juillet 1972 behind the backdrop of the jurisprudence by the Cour de Cassation: co-existence by means of interpretation*

At first uncertainty pre-dominated over the question of whether the newly adopted law would challenge the regime of no-fault liability, which had previously been established by the ruling in *Giry* for activities performed by the *police judiciaire*. With the new law emerging amidst the proactive jurisprudence by the *Cour de Cassation*, Perrot implied that the new law “*risque de constituer un recul par rapport aux solutions de la jurisprudence antérieure qui tendait à admettre une responsabilité sans faute sur le seul fondement de l’égalité devant les charges publiques*”.¹⁰⁰⁴ The same concern was echoed by René Chapus when he argued that the law of 1972 seemed to conflict with the earlier jurisprudence of the *Cour de Cassation*, which had emerged from the case of *Giry*. As the reader will recall, this case had opened up the

¹⁰⁰³ For a detailed explanation of the concept of ‘*la prise à partie*’ see FN 971.

¹⁰⁰⁴ COMPERNOLLE and CLOSSET-MARCHAL, “La responsabilité...,” *supra* note 866, p. 422.

remarkable opportunity for victims of harm incurred by the *justice judiciaire* to claim strict responsibility, i.e. responsibility without fault, or responsibility for *faute simple*. The matter was finally clarified in a judgment of 10 June 1986, where the *Cour de Cassation* interpreted the normative framework provided for by the law of 1972 in a strict and narrow manner. The Court held that the newly adopted liability regime only embraced the acts of courts as well as those acts which were not detachable from them.¹⁰⁰⁵ It followed from the Court's reasoning that any activity performed by the *police judiciaire* was not to be subsumed under the *Loi du 5 juillet 1972*. Consequently, the regime of liability *sans faute* remained applicable to all activities performed by the *police judiciaire*.¹⁰⁰⁶

Chapus had posited his argument on the assumption that if the intention of the legislature had been to improve the position of the victims, it coercively followed that the law was to be construed accordingly. Therefore, Chapus argued that the *Loi du 5 Juillet 1972* had to be interpreted in a restrictive manner in two ways: first, to allow for a fluid attunement between the legal provisions of 1972 and the jurisprudence by the *Cour de Cassation*, the expression “*service de la justice*” as used in the law merited special interpretation. In order to avoid entirely depriving victims of the responsibility regime without fault or for *faute simple*, as previously established in the jurisprudence of the ordinary courts, the “*service de la justice*” had to be understood as a body whose acts comprised the courts' activities and also those acts that inevitably could not be detached from the courts. Consequently, in line with the reasoning of the *Cour de Cassation*, Chapus elaborated on this compromise and eventually concluded that activities of the *police judiciaire* did not fall within the ambit of the *Loi du 5 juillet 1972*. Secondly, whenever the assessment of State responsibility was based on (what is now) Article L.141-1 of the Courts of Justice Act,¹⁰⁰⁷ the classification of “*faute lourde*” or denial of justice was always conditioned

¹⁰⁰⁵ *Arrêt du 10 juin 1986, RFDA*, 1987, p. 92.

¹⁰⁰⁶ Confirmed, *inter alia*, in *Cour de Cassation, Cass. Civ. (1^{re} ch.)*, 9 mars 1999, *Malaurie c/ agent judiciaire du Trésor public*. See also DEBBASCH and COLIN, *Droit Administratif*, *supra* note 893, p. 522.

¹⁰⁰⁷ Expression used as translated by Larouche in VAN GERVEN *et al.*, *Tort Law*, *supra* note 238, p. 383.

by the circumstances of each individual case and inevitably by the subjective perception of the facts of the case by the competent judge.¹⁰⁰⁸

Looking at the latest jurisprudence of the *Cour de Cassation*, one can indeed observe that there is a tendency in practice to bend and stretch the notion of *faute lourde*. However, the limits of interpretation imposed by EU law are nevertheless respected.¹⁰⁰⁹ In a recent judgment, the supreme jurisdiction defined *faute lourde*, generally speaking, as including all deficiencies characterized by an act or a series of acts that demonstrate the unfitness of the judicial branch to fulfil the mission with which it has been charged.¹⁰¹⁰ Refusing to abandon the pre-condition of *faute lourde* for *faute simple*, the *Cour de Cassation* – with due respect for the right to a fair trial as guaranteed under Article 6 of the ECHR – redefined the notion of fault and based it on objective criteria.¹⁰¹¹ To better understand how this judgment diluted the definition of the notion of ‘*faute lourde*’, it is necessary to take into account its interpretation in the antecedent case law. In a judgment of the *Tribunal de grande instance* of Paris in 1999, for instance, ‘*faute lourde*’ was described as a violation which had either been caused by such gross mistake that a *magistrat*, who was generally diligent in his duties, would not have committed or a violation which comprised the person’s clear intention to harm, or which was the result of an extreme, atypical and wrongful behaviour.¹⁰¹² In the latter, the expression of *faute lourde* had still been defined with reference to almost exclusively subjective criteria.¹⁰¹³

¹⁰⁰⁸ CHAPUS, *Droit Administratif*..., *supra* note 898, pp. 1329-1330.

¹⁰⁰⁹ DEBBASCH and COLIN, *Droit Administratif*, *supra* note 893, p. 558.

¹⁰¹⁰ “[...] toute déficience caractérisée par un fait ou une série de faits traduisant l’inaptitude du service public de la justice à remplir la mission dont il est investi”; Ass. Plén., 23 fév. 2001, *Bolle et Laroche*, Dalloz 2000, p. 1752.

¹⁰¹¹ J.-J. MENURET, *note sous Cass., ass. plén.*, 23 fév. 2001, *Bolle et Laroche*, JCP (éd. gén.), du 5 septembre 2001, II, n°10583, p. 1630.

¹⁰¹² “[...] soit a été commise sous l’influence d’une erreur tellement grossière qu’un magistrat normalement soucieux de ses devoirs n’y eût pas été entraîné, soit relève une intention de nuire de la part de son auteur, soit procède d’un comportement anormalement déficient” TGI Paris, 22 juillet 1999, Dalloz 1999, IR (informations rapides), p. 214.

¹⁰¹³ With respect to these definitions, an ordinary judge did not consider it to be a grave fault by the registry of the court and a *Tribunal de Grande Instance* to assume competence and to rule in a case that should have been decided by the *Tribunal de Commerce* (Cass., civ. (1^{ère} ch.), 20 février 1996, *Lucas*, Dalloz 1996, IR, p. 83). The same classification applied to a case where a judge made insinuating and detrimental remarks with respect to a lawyer (Cass. civ. (1^{ère} ch.), 13. octobre 1998, Dalloz 1998, IR, p.

The notion of *denial of justice* was initially confined to a restrictive conceptual definition termed from the legislation regulating the procedure of “*la prise à partie*”.¹⁰¹⁴ Hence, before 1972 the condition of denial of justice was prevalent in instances where the judge refused to rule in a case without a valid motive, under the pretext of silence, obscurity or insufficiency of the law, or also by pretending to wait for a ruling from another court or some expert’s report. In this context, denial of justice was limited to personal failure by the judge.

Within the ambit of the *Loi du 5 juillet 1972*, however, the assumptions affirming denial of justice as an autonomous concept of fault were more permeable. According to Menuret, the definition had a wider interpretation as a result of the relevant case-law and was one favoured by Favoreu which he had already proposed early on in his writings.¹⁰¹⁵ According to the latter, it was preferable to consider denial of justice as the failure of the State’s duty to judicially protect of the individual rather than as a mere breach of duties by a judge.¹⁰¹⁶ As a corollary, hypotheses amounting to a denial of justice included from then on, in addition to the “traditional” cases, instances of excessive length or unjustified delay of proceedings;¹⁰¹⁷ “*tout manquement de l’Etat à son devoir de protection juridictionnelle d’un individu*”.¹⁰¹⁸

246). On the contrary, grave negligence was affirmed in cases such as the invitation by the minister of justice to the public prosecution to pursue importers despite a contrary ruling by the CJEU (*Cass.*, *Com.*, 21 février 1995, *Soc. United Distillers*, *Droit administrative*, 1995, n° 303); in a case concerning allegations of fraud the disclosure of information by the investigators, which allowed for the identification of the persons involved (*Cass. civ.* (1^{re} ch.), 9 mars 1999, *Malaurie*, *Dalloz* 2000, p. 398); the omission to make copies of certain files in the proceedings, which led to a disruption of the pre-trial inquiries in the case (*TGI Paris*, 5 janvier 2000, *Mme Dasquet*, *Dalloz* 2000, IR, p. 45); or in the case of absence of judicially relevant information and neglect in the course of an attempted identification of an individual charged with aggression and rape (*TGI Paris*, 21 février 2001, *Dalloz* 2001, IR, p. 1365 - “*Affaire du tueur de l’est parisien*”).

¹⁰¹⁴ For a detailed explanation of the concept of ‘*la prise à partie*’ see FN 971.

¹⁰¹⁵ MENURET, *supra* note 1011, p. 1627.

¹⁰¹⁶ Favoreu promulgated a broad definition of *deni de justice* as “*un manquement de l’État à son devoir de protection juridictionnelle de l’individu*” and not merely as “*un manquement du juge à sa mission*”. See L. FAVOREU, “Du déni de justice en droit public français”, *thèse*, LGDJ, Paris, 1964, p. 534.

¹⁰¹⁷ Denial of justice also includes the right of the individual to a consideration of his or her claims within a reasonable time span (“*dans un délai raisonnable*”): *TGI Paris*, 9 novembre 1997, *Gauthier*, *Dalloz*, 1998, p. 9; *TGI Paris*, 20 janvier 1999, *Dalloz* 1999, IR, p. 12.

¹⁰¹⁸ *TGI Paris*, 6 juillet 1994, *Christophe et Armande de Jaeger/Agent judiciaire du Trésor*, JCP (éd. gén.), 1994, I, 3805, n°2.

In sum, the requirements of *faute lourde* and denial of justice were subject to a rather far-reaching judicial interpretation. Further limitations on the definition of these two elements originated - as has already been discussed in detail - from exceptional dispositions in specific legal provisions.¹⁰¹⁹

The most recent jurisprudence has even opened up the possibility for victims of damage committed by the *justice judiciaire* to make a claim based either on strict responsibility of the State, i.e. responsibility without fault, or based on liability for *faute simple*. In fact, a judgment by the *Cour de Cassation* of 23 February 2001 reasoned that (former) Article L.781-1 might not be the only basis for claims of State responsibility for breaches committed by the *justice judiciaire*. The jurisprudence evolved to extend beyond the elements of what had constituted - until then - the basic conditions for invoking State liability. The scope of its application was deliberately widened to acknowledge the procedural demands of Article 6 of the European Convention of Human Rights as an additional valid legal ground for seeking to find the State liable for damage caused by the *justice judiciaire*.¹⁰²⁰ Accordingly, in an attempt to clarify the interplay between the different legal bases at stake, the *Cour de Cassation* ruled that the existence of a separate liability regime for damages incurred by the ordinary judiciary, which did not deprive the individual from his or her right to a judge, would not be in contradiction with the requirements of Article 6 ECHR. In short, the *Conseil Constitutionnel* confirmed the compatibility of the condition of *faute lourde* with the demands of Article 6 ECHR and its requirement to warrant an individual's right to a fair trial.¹⁰²¹ This judgment also provides further evidence for the fact that, within this specific context, ever-greater recourse has been had to the guarantees enshrined in the ECHR, especially Article 6(1). This certainly held true for the specific question of the State's responsibility for breaches by the *justice judiciaire* in France.¹⁰²²

¹⁰¹⁹ We will analyse the normative exceptions at a later point in this chapter.

¹⁰²⁰ CHAPUS, *Droit Administratif...*, *supra* note 898, p. 1331.

¹⁰²¹ *Cass.*, ass. plén., *Bolle-Laroch*, *supra* note 1010.

¹⁰²² MENURET, *supra* note 1011, p. 1627.

vi) *Ambit and scope of application of the Loi du 5 Juillet 1972*

Generally speaking, Article L.141-1 of the Courts of Justice Act in its current form could be viewed as an umbrella provision covering all elements of jurisdiction of ordinary courts, which would, more precisely, include all judicial acts from the preliminary hearings to the judgment in the proceedings as well as the acts of execution administered by the *service de la justice*, i.e. the administration of justice. Excluded from the applicability of this Article are the entire administrative jurisdiction and all independent administrative authorities, even, in the case that the latter, when they carried out quasi-judicial functions, apply a court-like procedure or are controlled by a *juge judiciaire*.¹⁰²³

However, in addition to tracing out its broader limits of applicability, within the law's general field of application it is also necessary to consider precisely which acts of the ordinary judicial branch the law of 1972 included or excluded. In line with the use of rather general terms in Article 11 of the *Loi du 5 juillet 1972*, one could assume that the liability of the State was engaged on the basis of all acts performed by members or auxiliary members of the ordinary judiciary.¹⁰²⁴ Furthermore, the 1972 law could theoretically also embrace all acts performed by judges, whether those acts were of a judicial nature or not, as well as all administrative deeds accomplished by auxiliaries in the process of preparing a judicial decision. Moreover, it remained unclear whether the 1972 law had abolished the old distinction between judicial acts, whose status of *res judicata* would not allow for a re-opening of the case qua claim for liability on the one hand, and non-judicial acts on the other, which could, in a specific area and under certain conditions, engage the liability of the State.¹⁰²⁵

According to the formula used in the jurisprudence, the list of eligible *actors*, who fall under (former) Article L.781-1, includes all judges as well as those

¹⁰²³ Ibid.

¹⁰²⁴ Article 11 of the law of 5 July 1972 promulgated that “[l]’État est tenu de réparer le dommage causé par le fonctionnement défectueux du service de la justice.”

¹⁰²⁵ For a critical view on Article L.141-1/2 *Code de l’Organisation Judiciaire* see GEORGES WIEDERKEHR, “La responsabilité de l’État et des magistrats du fait de la justice” (1997) *Justices, Revue Générale de Droit Processuel* 5, p. 18.

individuals who have been placed under the judges' direct control and authority. This in turn implies that the status of the individuals concerned is in fact of little relevance.¹⁰²⁶ As a rule of thumb, the *Loi du 5 juillet 1972* regulates questions of liability for harm resulting from the general *functioning*¹⁰²⁷ of the judicial service. Thus, the law only deals with damages caused to those parties, which are actually in the process of resorting to the public service of ordinary justice. Moreover, as previously demonstrated, the law does not embrace cases of liability for any acts performed by occasional collaborators of the public judicial service.¹⁰²⁸ Instead, the latter category is judged according to a regime of responsibility *sans faute*.¹⁰²⁹ The attempt to determine the *type of acts* subsumable under (former) Article L.781-1 appears to be a little more difficult. In light of the focus of this present study, this issue will not be discussed in detail. However, what can immediately be extracted from its ambit of application are all cases of liability related to aspects of *organisation* of the *justice judiciaire*, which fall under the competence of the administrative courts.¹⁰³⁰

Generally speaking, the admission of the State's responsibility for the activities of its judicial branch raises a number of rather delicate problems. One of them is the question of who is competent to rule upon acts attributable to the judiciary as a whole. In France, the administrative judge is competent to rule upon any violation lying in the ambit of his/her own branch of justice, i.e. the *justice administrative*. For the

¹⁰²⁶ Therefore, it includes also acts by the registrar, occasional collaborators of justice or other experts involved in the proceedings. Despite the affiliation of an *auxiliaire de justice* to either the ordinary or the administrative judicial branch, the *justice ordinaire* has the general competence with respect to the judicial auxiliaries to rule on all questions of responsibility. Ibid, p. 18. Furthermore, see JACQUES MOREAU, "La Responsabilité des magistrats et de l'État du fait de la justice" (1997) *Justices, Revue Générale de Droit Processuel* 5, p. 45.

¹⁰²⁷ Examples qualifying as dysfunctions of the *justice judiciaire* are, *inter alia*, mistakes made by the *service d'enquête*, the service responsible for gathering evidence in a case (*Cass. civ. (1^{re} ch.)*, 9 mars 1999, *Malaurie c/agent judiciaire du Trésor public*, D, 2000, *Jurisprudence*, 398); the leaking to the press of information relevant to a case by the public prosecutors (*Tribunal de grande Instance de Paris (1^{re} ch.)*, 3 avril 1996, *Affaire Bonnet, Noir, Guinchard c/ État*, *Gaz. Pal.*, 21 novembre 1996, 584) or mistakes made by judges at the inquiry stage of the proceedings (*TGI de Paris*, 5 janv. 2000 et 24 janv. 2001). Any abnormal delay in proceedings constitutes an example for what classifies as a '*déni de justice*' (*CA Paris*, 8 mars 2000).

¹⁰²⁸ As stipulated in the case of *Cass. Civ.*, *Giry*, *supra* note 911.

¹⁰²⁹ DEBBASCH and COLIN, *Droit Administratif*, *supra* note 893, p. 557.

¹⁰³⁰ Ibid, p. 557.

justice judiciaire, however, the question of competence is divided between the administrative jurisdiction which deals with organisational issues in respect of the ordinary judicial service and the ordinary judicial branch, which deals with aspects related to its own functioning.¹⁰³¹ Overall, this legislation so far has only given rise to a rather insignificant number of cases. Among those, there are only a handful of judgments that have actually awarded any form of compensation to the harmed individual.¹⁰³² In fact, the literature has repeatedly referred to the respective normative provisions as “*un texte mort né*”.¹⁰³³

b) State liability for breaches incurred by the *justice administrative*

While from 1972 onwards the liability regime for breaches by the *justice judiciaire* had finally been firmly embedded in a concrete and enforceable normative framework, the administrative judicial branch did not instantly follow the same logic. In fact, until rather recently, no matter what the specific administrative jurisdiction might have been, the activity of administrative judges was not at all susceptible to State liability. The 1972 law continued to be applicable exclusively with respect to breaches by the *justice judiciaire*. A separate regime of State liability for violations by the administrative judicial branch in France was eventually created and developed by the jurisprudence of the *Conseil d'État*. Hence while the early jurisprudence of the *Cour de Cassation* on this issue had over time led to a legal codification of the concept in form of the Law of 5 July 1972, the framework of State liability incurred by the *justice administrative* remained entirely judge-made.

The ruling of the *Conseil d'État* in the case of *Darmont*¹⁰³⁴ of 29 December 1978 ended the quasi-immunity of the State with respect to breaches committed by the *justice administrative*. In this judgment, the *Conseil d'Etat* ruled out the identical

¹⁰³¹ Ibid, p. 556.

¹⁰³² For example, decision of the *TGI, Paris*, 19 septembre 1990, RDP, 1990, p. 1859.

¹⁰³³ This expression could be literally translated as “still-born”. It was first used by R. Blum in a question to the minister of justice. See JACQUES VAN COMPERNOLLE, “Considérations sur la responsabilité de l'État du fait du fonctionnement défectueux de la justice en droit belge” (1997) *Justices, Revue Générale de Droit Processuel* 1 (Jan.-Mars), note 42.

¹⁰³⁴ *Conseil d'État, Ass.*, 29 décembre 1978, *Darmont*, *Rec. des décisions du Conseil d'État*, p. 542.

application of the normative framework, which had been established for the ambit of the *justice judiciaire*.¹⁰³⁵ Leaving aside Article 11 of the Law of 5 July 1972, which according to its nature as a civil procedural norm – as the Court stated – only concerned ordinary courts, the *Conseil d'État* was nevertheless inspired by the codified solution and even refined the rule slightly. Subsequently, the Court took a more proactive approach and proceeded to determine the legal contours of the State's liability for wrongful acts committed by the administrative judiciary. With special regard to the general principles ruling public liability, the Court proclaimed that only the occurrence of a "*faute lourde*" would suffice to engage the responsibility of the State for mistakes that were attributable to the administrative judicial branch.¹⁰³⁶

Emphasizing the specificity of the judicial function, the *Haute Assemblée* added a further element to its general definition of public liability. It stipulated that when the *faute lourde* resulted from the content of a definitive judgment itself, the authority of *res judicata* attached to a judgment would absolve the State of responsibility.¹⁰³⁷ Hence, in this case the authority that was directly linked to the judicial decision in question, was protected from liability claims if the judgment had become final and had therefore acquired the status of *res judicata*.¹⁰³⁸ René Chapus argued that the same type of limitation with respect to judicial mistakes rooted in the content of a final judgment should be applied also with respect to the law of 1972 concerning

¹⁰³⁵ "[...] que s'il se prévaut à cet égard des dispositions de l'article 11 de la loi n. 72-626 du 5 juillet 1972 mettant à la charge de l'État la réparation du dommage causé par le fonctionnement défectueux du service de la justice, ces dispositions, d'ailleurs postérieures aux décisions critiquées, ne concernent que les juridictions de l'ordre judiciaire et ne s'appliquent pas aux juridictions de l'ordre administrative." In *Ibid* p. 542.

¹⁰³⁶ "Considérant que si, en vertu des principes généraux régissant la responsabilité de la puissance publique, une faute lourde commise dans l'exercice de la fonction juridictionnelle par une juridiction administrative est susceptible d'ouvrir droit à indemnité [...]" *Ibid*, p. 542.

¹⁰³⁷ "[L]'autorité qui s'attache à la chose jugée s'oppose à la mise en jeu de cette responsabilité, dans le cas où la faute lourde alléguée résulterait du contenu même de la décision juridictionnelle et où cette décision serait devenue définitive." In *Ibid*, p. 542. This rule leaves open the possibility for the individual to claim damages, *inter alia*, for a ruling that has not acquired the status of *res judicata*, or for a judgment that has been annulled. On this point see also DOMINIQUE BLANCHET, "L'usage de la théorie de l'acte clair en droit communautaire: une hypothèse de mise en jeu de la responsabilité de l'Etat français du fait de la fonction juridictionnelle?" (2001) 37 *Revue Trimestrielle de Droit Européen* 2, p. 435.

¹⁰³⁸ DONY, "Le Droit...", *supra* note 893, p. 247. See also CHAPUS, *Droit Administratif...*, *supra* note 898, n°1280; DEBBASCH and COLIN, *Droit Administratif*, *supra* note 893, p. 559.

violations incurred by the *justice judiciaire*.¹⁰³⁹ In light of the recent decision by the CJEU in the case *Traghetti del Mediterraneo SpA*, it remains however disputable whether such a limitation to the domestic liability regime as a whole would actually be in conformity with the standards required under European law.¹⁰⁴⁰

Ever since the ruling in *Darmont*, all decisions taken on this matter have rejected the application for liability of the State, hindered by either the obstacle of *res judicata*, i.e. a final or definitive judgment, or by the absence of the necessary '*faute lourde*'. Conversely, if the wrongful act is not related to the ambit and exercise of the judicial function, then, as in the case of responsibility of the State for damages resulting from the activities of the *justice judiciaire*, '*faute lourde*' is not a condition.¹⁰⁴¹ The restrictive framework of State liability for breaches by the administrative judicial branch was condemned several times at the European level for unreasonable delay in the court proceedings.¹⁰⁴² As a consequence, the *Conseil d'État* has since slightly reversed its case law so as to accommodate the right to a hearing within a reasonable time requirement of Article 6(1) ECHR by setting aside the precondition of *faute lourde* in such cases regarding the violation of the right to a hearing within a reasonable time as guaranteed under Article 6(1) of the ECHR. In fact, the Court decided that in this context, the State's responsibility could already be invoked in the case of occurrence of a *faute simple*.¹⁰⁴³

¹⁰³⁹ CHAPUS, *Droit Administratif*..., *supra* note 898, p. 1333. The proposal to extend the principle of *l'autorité de la chose jugée* to the ambit of the *justice judiciaire* remains rather contested. There is a single judgment of 17 February 1988, in which the *Tribunal de grande instance* of Paris supported the analogous application of the restriction to the ordinary judiciary. On page 5 of the judgment the Court stated that: "*Subsidiairement il conclut au mal fondé en soutenant que l'autorité de la chose jugée s'oppose à la mise en oeuvre de la responsabilité de la puissance publique dès lors que la faute lourde alléguée résulterait du contenu même de cette décision devenue définitive.*" On this issue see also DONY, "Le Droit...", *supra* note 894, p. 247.

¹⁰⁴⁰ For the compatibility of the domestic restrictions on State liability with the Court's recent judgment in the case C-173/03, *Traghetti*, *supra* note 134, see chapter IV.

¹⁰⁴¹ CHAPUS, *Droit Administratif*..., *supra* note 898, p. 1333.

¹⁰⁴² See, for example, ECHR, 24 October 1989, *H. c/ France*; ECHR, 31 March 1992, *X. c/ France*; ECHR, 18 December 2001, *SAPL c/ France*; ECHR, 26 March 2002, *Lutz c/ France*.

¹⁰⁴³ See, *inter alia*, CE, Ass., 28 juin 2002, *Ministre de la Justice c/ Magiera*, Req. 239575. DEBBASCH and COLIN, *Droit Administratif*, *supra* note 893, p. 560.

We can conclude that in the specific area of responsibility of public authorities for damages attributable to the ordinary and the administrative judicial apparatus, the system has developed from a general lack of responsibility of the State to a mosaic of different regimes of legislative or judicial origin, which are more or less widely open to victims according to the interpretation attributed by the responsible judge to the notion of *faute lourde*. However, while in theory the concepts of State responsibility for judicial breaches have reached a respectable level of maturity in France, the practical relevance of these concepts has yet to be shown. On a more pessimistic note, René Chapus has already made the final prediction that the responsibility of the State for the functioning of the judiciary is destined to remain only an exceptional form of liability.¹⁰⁴⁴

A rather similar situation arises in Hungary. According to a ruling of the Hungarian Supreme Court (*Pfv.X.20.924/2001*) of 2001, errors in judgment and interpretation shall invoke liability for damages only if they are *grossly aggravating*. However, it should be underlined at this point that the Hungarian Civil Code is currently undergoing a process of substantial reform and modernization. The core issues of the necessary amendments to the new Civil Code have been summarized in the so-called ‘Conception’. The document entitled “[t]he Conception of the new Civil Code” is accessible in English on the homepage of the Hungarian Ministry of Justice and Law Enforcement (<http://irm.gov.hu/?mi=1&katid=193&id=217&cikkid=3309>). Accordingly, rules pertaining to public liability for extra-contractual damage are going to be revised (see Book 4: Obligations, Part 5: Tort liability).

¹⁰⁴⁴ CHAPUS, *Droit Administratif...*, *supra* note 898, p. 1334.

3. State liability for breaches of EC law: the phenomenon of mutual permeation

France, as one of the founding fathers of the European Community, has not only served as a source of inspiration and a legal model in the development of the Community structures from the very beginning, but was in turn also exposed early on to the immediate as well as the more oblique influences of EC law upon its domestic law. This impact certainly included the early jurisprudence by the Court of Justice of the European Union on the question of extra-contractual liability of Member States for breaches of European Community law. As already discussed, the breach of Community law obligations may render a Member State liable to pay compensation or damages under rules that are in continuous development by the CJEU in Luxembourg. As vividly demonstrated in the CJEU's recent judgment in the case of *Traghetti del Mediterraneo SpA*,¹⁰⁴⁵ the concept of Member State liability under Community law is a moving target, which constantly requires the national legal orders to adjust to norms set at the European level.

What impact did France's membership in the EC originally have upon the domestic framework of non-contractual liability of the State? In what ways has Community law affected the nature of the domestic liability regime? What is the overall position accorded to EC law in the jurisprudence of the French courts? These questions certainly involve a heavyset of different aspects. An attempt to provide an adequate answer to all of them would easily constitute a thesis on its own. However, the aim here is the more modest and realisable one of devoting special attention to the impact EC law has had over time on the domestic liability regime of the State for breaches of law by the French State bodies. Analysing its impact on the domestic liability regime for administrative and legislative breaches, we may be able to detect certain patterns or possibly a reoccurring behaviour in reaction to changes at the Community level. This, in turn, might allow us to draw preliminary conclusions on the way the newly established *Köbler* doctrine could be received within the existing confines of French law. Based on the previous outline of the basic liability scheme of

¹⁰⁴⁵ Case C-173/03, *Traghetti*, *supra* note 134, paras. 1 *et seq.*

public authorities in France, the focus will now turn to the question of how the domestic State liability regime accommodates a breach of Community law by the executive or the legislature.

a) Has the *Francovich* line prior to *Köbler* already had a spill-over effect on the concept and/or the limits of State liability in France?

According to the principle of national procedural autonomy, the CJEU leaves it to the Member States to determine the procedural and substantive conditions with respect to the remedies granted to the individual for damage sustained as a result of a Member State's violation of Community law. With respect to France, the *Conseil d'État* has resorted to the corresponding national law on public liability. In theory, if national law serves as the vehicle by which the Community right takes effect on the domestic level, it has to be strictly interpreted in conformity with the principles established on the Community level.¹⁰⁴⁶ However, one can observe certain congruence between the conditions required for the application of a national State liability claim and one that is based on Community law. In fact, as argued in the literature, French law and the Community regime of State liability are so closely related that legislation specifically regulating this aspect does not appear to be imminently necessary.¹⁰⁴⁷

With regard to France, the focus is certainly on the domestic court which is competent to rule upon questions of State liability. What has been the position of the *Conseil d'État* towards violations of Community law by public authorities in France? The application of Community law in the jurisprudence of the *Conseil d'État* has to be examined with particular care because from the very beginning the *Conseil d'État*, more than any other court in the European Community, had a tendency to interpret EC

¹⁰⁴⁶ See, in particular, FUNK, "Staatshaftung...", *supra* note 641, pp. 553 *et seq*; REBHANN, "Staatshaftung...", *supra* note 148, p. 759.

¹⁰⁴⁷ French law has strongly influenced the CJEU's jurisprudence on Art. 215 II EG. Subsequently this regime outlining the Community's liability has in turn shaped the structure of Member State liability for breaches of EC law. See HERDEGEN, *Die Haftung der Europäischen Wirtschaftsgemeinschaft für fehlerhafte Rechtsetzungsakte* (Berlin, 1983, Duncker & Humblot), pp. 75 *et seq*. In this sense also WOLF, *Staatshaftung*, *supra* note 909, p. 282. Contrary to the author's appraisal of the situation, Wolf even accredits the French judiciary progressive behavior and openness towards State liability claims for breaches of Community law.

law contrary to the CJEU.¹⁰⁴⁸ This way of proceeding might have enhanced the Court's initial attempt to preserve French national legal traditions, but in turn it also put a strain on the wide-reaching institutional and procedural autonomy granted to the Member States under EC law. In the literature, the *Conseil d'État's* initial hostility towards Community law has even been termed as "*Gallicanisme*".¹⁰⁴⁹ With that in mind, the Court's reaction to previous changes induced by the *Francovich* line of cases could form the basis for predicting how the *Köbler* doctrine could be received in French law. Once again, in this context it is important to divide the problem into different hypotheses, i.e. the various scenarios of violations of Community law incurred by the national executive, the legislature or the judiciary.¹⁰⁵⁰

*i) State liability for breaches of EC law by the administrative authorities*¹⁰⁵¹

As frequently underlined in the doctrine, currently cases of administrative breaches of Community law do not appear to pose any particular problems of absorption under French law. In fact, according to Louis Dubouis,¹⁰⁵² the *Francovich* doctrine can be easily accommodated into the existing domestic framework of public liability for administrative breaches. Practice shows that France allows for a wide range of cases affirming State liability where the State qua administrator fails to fulfil its obligations, whatever the source of these obligations might be. The violation of EC treaty provisions, a violation of Community directives, regulations or Community decisions generally account for a wrongful behaviour, which entails the State's obligation to repair the damage caused to an individual as a result of the illicit public act. As for the national regime of State liability *pour faute*, the illegitimacy of an act

¹⁰⁴⁸ Ibid, p. 243.

¹⁰⁴⁹ SIMON, "Le Conseil d'État et les directives communautaires: du gallicanisme à l'orthodoxie?" RTDE 1992, p. 265.

¹⁰⁵⁰ DONY, "Le Droit...", *supra* note 893, p. 254.

¹⁰⁵¹ Ibid, p. 254.

¹⁰⁵² "La responsabilité de l'Etat pour les dommages causés aux particuliers par la violation du droit communautaire" *Rev. fr. dr. adm.*, 1992, pp. 1 *et seq.*

due to a breach of Community law automatically also signals the existence of a fault.¹⁰⁵³

In line with the CJEU's requirement of a sufficiently serious breach, the *Conseil d'État* would therefore first look for the commission of a fault, i.e. an illegality, by the respective public authority, be it a violation of national law or a breach of Community law. In this connection, liability for *faute de service* for breaches of Community law by the administrative branch includes not only individual acts, but also general regulations by the executive. However, where the act cannot be classified as wrongful, the *Conseil d'État* moves on to test whether the conditions for no-fault liability are fulfilled. Following this logic, liability *sans faute* could theoretically never apply in case of administrative breaches of Community law, as a violation of EC law provisions already suffices to prove the existence of a fault, which consequently invokes liability *pour faute*. In practice, however, the *Conseil d'État* did not follow this procedural ideal from the very beginning. In fact, the Court at first remained completely silent about the question of "fault" and adhered to the general concept of State liability without declared illegality.¹⁰⁵⁴ Finally, in the decision *Philip Morris*¹⁰⁵⁵ of 28 February 1992, the *Conseil d'État* acknowledged the application of fault-based liability for administrative breaches of Community law.¹⁰⁵⁶

¹⁰⁵³ See, *inter alia*, *Les fils de Henri Ramel*, JCP, II, n°19500: This case concerns an official ban by the prefect in March 1975 on all foreign ships accessing the port of Sète. After the company '*Les fils de Henri Ramel*' claimed liability for the resulting economic loss due to its inability to access the port, the *Conseil d'État* ruled that the restriction was justified by concerns of public order, which in turn also constitutes, according to the *Conseil d'État*, a valid exception from Article 26 TE. The *Conseil d'État* concluded that the prefect's order did not violate Community law. Hence, it did not constitute an illegitimate act. Thereafter, the *Conseil d'État* proceeded to invoke liability *sans faute*. In a similar manner, see also *CE, 7 octobre 1987, Ministre de la Culture/consorts Genty, Rec. Lebon*, p. 304.

¹⁰⁵⁴ There are some controversial decisions by the *Conseil d'État*, which do not go conform to this rule. One of these highly disputed judgments was the *Conseil d'État*'s decision in *Alivar* of 24 March 1984 (*RTDE*, 1984, p. 341, with dissenting Opinion of M. Denoix de Saint Marc). In this judgment, the *CE* decided on liability *sans faute* even though the case contained a clear violation of Community law by a public authority, which the CJEU had even confirmed in an earlier judgment (C-68/76). However, the *Conseil d'État* ended up following a different reasoning in its final ruling, justifying the restricting measures as having been implemented for reasons of general interest. Hence, due to the legality of the act, the *Conseil d'État* concluded that the State could only be held liable according to the conditions of no-fault liability. The decision was heavily criticised as it awarded compensation for breach of Community law on the basis of liability *sans faute*.

¹⁰⁵⁵ *Conseil d'État*, 28 février 1992, *Philip Morris*, *AJDA* 1992, p. 225.

¹⁰⁵⁶ Lower instance courts had already recognized the existence of liability for *faute de service* of the administration before the *Philip Morris* decision. See for example, *TA Strasbourg*, 5 juin 1984,

Despite the early rulings by the *Conseil d'État*, the lower administrative courts in France also went through a period of adjustment with respect to the task of accommodating administrative breaches of EC law under the established domestic liability regime. A series of decisions taken by various administrative courts in reaction to the CJEU's judgment¹⁰⁵⁷ in a large dispute concerning wine imports between Italy and France, for instance, resulted in a different reasoning by the various national courts in the related cases. Charged to rule upon liability claims brought forward by several harmed companies, not only the courts' reasoning diverged, but the case even cumulated in final judgments, which openly contradicted the CJEU's earlier reasoning.¹⁰⁵⁸ In short, this line of cases demonstrates the slow, but progressive evolution in the jurisprudence of the French administrative courts towards the application of fault-based State liability for breaches of Community law by the administrative branch.¹⁰⁵⁹

*ii) State liability for breaches of Community law by the legislature*¹⁰⁶⁰

From a Community law perspective, national courts should also no longer shirk from holding the legislature proper liable for breaches of Community law. In the *Brasserie du Pêcheur* judgment of 5 March 1996, the CJEU had after all repeatedly stated that the principle of State liability for violations of EC law would arise by virtue of Community law and apply irrespective of the State organ, which was responsible for the breach of EC law.¹⁰⁶¹ At first, the French *Conseil d'État* was rather reluctant to recognise the primacy of EC law, the directly binding nature of European directives and the significance of the preliminary ruling procedure under Art. 267

CMLReports 1986, p. 625; CAA de Nantes, 20. juin 1991, *Duault*, AJDA 1992, p. 172. In this context, see also a key judgment of the CE of 1988 granting liability on the basis of *faute de service*: CE, 20 janvier 1988, *Aubin*, Rec. CE, p. 19. The latter has, however, not been recognized as a precedent due to the special circumstances of the case.

¹⁰⁵⁷ CJEU, C-42/82, *Commission v. France* (March 23, 1983).

¹⁰⁵⁸ *Tribunal administratif de Strasbourg*, 5 juin 1984, *Société Tresch-Alsacaves*, CMLR, 1986, p. 629; *Tribunal administratif de Dijon*, 15 avril 1986, *Société vinicole Berard*, RTDE, 1988, p. 109; *Cour administrative de Nantes*, 20 juin 1991, S.A. *Duault*, AJDA, 1992, p. 172.

¹⁰⁵⁹ DONY, "Le Droit...", *supra* note 893, p. 260.

¹⁰⁶⁰ *Ibid*, p. 269.

¹⁰⁶¹ See C-213/89, *Factortame*, *supra* note 8, para. 34.

TFEU. Moreover, until 1989 the *Conseil d'État* refused to review national legislation for its compliance with EC law. Apart from the circumstances where no-fault liability had been admitted, an Act of Parliament did not normally entail liability, even if enacted in breach of international treaty law or Community law. As will be recalled, the principle of separation of powers – a principle traditionally followed with great rigour in France – implied that French courts simply were not able to rule upon the illegality of an effective legislative provision due to its incompatibility with the Constitution.¹⁰⁶² With respect to Community law, the *Conseil d'État* therefore initially used the traditional argument that it was only competent to control the validity of administrative acts and that if it checked statutory provisions it would be overstepping its competences. In doing so, it would thereby unilaterally change the institutional balance of the national constitution.¹⁰⁶³ Hence, in case of conflict between Community and national law, the *Conseil d'État* initially applied the *lex posterior* rule, which meant that the law enacted at a later stage would apply. Consequently, until 1989 French administrative courts refused to review ordinary laws for their compatibility with Community law.

The early jurisprudence¹⁰⁶⁴ on this matter already dates back to the infamous *Affaire Jacques Vabre*,¹⁰⁶⁵ a case decided by the *Tribunal d'instance de Paris*, which was subsequently appealed to the *Cour d'appel de Paris* on 7 July 1973 and finally reached the *Cour de Cassation* on 25 May 1975. The case concerned a national law in France, which was in contradiction with Community law. This case presented the first occasion for the courts to discuss whether national law could in fact be declared incompatible with the EC Treaty.¹⁰⁶⁶ It also gave rise to first considerations both about the newly created hierarchy of norms that had resulted from the inclusion of Community law and its legal foundation, which the *Cour de Cassation* rooted in

¹⁰⁶² DONY, "Le Droit...", *supra* note 893, p. 275.

¹⁰⁶³ DICKSON, *Introduction...*, *supra* note 882, p. 60.

¹⁰⁶⁴ DONY, "Le Droit...", *supra* note 893, p. 275.

¹⁰⁶⁵ *Cour d'appel de Paris*, 7 juillet 1973, JT, 1973, p. 691 and *Cour de Cassation*, 24 mai 1975, RTDE, 1975, p. 631. A full-text version of the final judgment by the *Cour de Cassation* is available at: www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX1975X05X0MX00004X000.

¹⁰⁶⁶ See also CAPPELLETTI, *The Judicial Process...*, *supra* note 49, pp. 158 *et seq.*

Article 55 of the French Constitution. While the *Cour de Cassation* already recognized the primacy of Community law in the above-cited judgment of 1975 and agreed to review national law for its consistency with the EC Treaty, it took the *Conseil d'État* almost another fifteen years to do the same.¹⁰⁶⁷

It was only in 1989 with its judgment in *Nicolo*,¹⁰⁶⁸ that the *Conseil d'État*'s approach finally changed. In this case, the *Conseil d'État* accepted that it could after all review the compatibility of Acts of Parliament with the Community treaty and set them aside if they proved to be incompatible. In this decision, the Court reasoned that the EC Treaty had priority over national law solely on the basis of Article 55 of the French Constitution. The Court reached this conclusion by equating the position of public international law with that of the EC Treaty. In this way, the *Conseil d'État* simply subsumed the latter under Article 55 of the French Constitution.¹⁰⁶⁹ A similar stance was adopted towards secondary Community law with respect to regulations¹⁰⁷⁰ in 1990, and directives¹⁰⁷¹ in 1992. In a nutshell, in the groundbreaking ruling in *Nicolo* the new hierarchy of norms, i.e. the principle of primacy of primary and secondary Community law over national law, had finally been explicitly recognized by the administrative courts. This in turn was an indispensable precondition for

¹⁰⁶⁷ The second noteworthy judgment in this context was the decision in the case *Société Arizona Tobacco Products* (AJDA 1992.210). In this case, the *Conseil d'État* would have had the opportunity to address in a direct manner the issue of State liability for legislative breaches of Community law, but in the end chose to circumvent it. The basic facts of the case concerned the transposition of the Community directive of 19 December 1972 into national law, which set up general principles for a Europe-wide harmonization of taxes imposed on tobacco manufacturers. In an infringement procedure against France (Judgment of 21 June 1983, C-90/82, *Commission v. France*, Rec., p. 2011), the CJEU ruled that the transposition into national law was incompatible with the case-specific requirements of Community law. Subsequently, a claim for compensation by the company *International Sales & Import Corporation*, which had suffered harm as a result of the national regulation, was rejected by the *Conseil d'État* (13 décembre 1985, AJDA, 1986, p. 174). The court stated that the claim once again tried to raise the issue of compatibility of national law with Community law provisions and argued that this question could not be discussed effectively in front of an administrative judge.

¹⁰⁶⁸ *CE, ass.*, 20 octobre 1989, *Nicolo*, Rec. CE 1989, p. 190. See also BROWN and BELL, *French Administrative...*, *supra* note 897, pp. 285 *et seq.*

¹⁰⁶⁹ *Ibid*: “En vertu des dispositions de l'article 55 de la Constitution, il appartient au juge administratif de contrôler la compatibilité entre les traités internationaux et les lois françaises même postérieures.”

¹⁰⁷⁰ *CE*, 24 septembre 1990, *Boisdet*, AJDA 1990, p. 906.

¹⁰⁷¹ *Philip Morris*, *supra* note 1055, p. 224. By then, the *CE* regularly reviewed national laws for their compliance with Community directives. However, the Court still refused to acknowledge the principle of direct effect of EC directives.

establishing the principle of State liability for legislative breaches of Community law. Therefore, it seemed to be a logical assumption that after the Court's decision in *Nicolo*, the State *qua* legislature should also be held liable under the framework of liability *pour faute* for a breach of Community law. Theoretically, the same principle should apply to administrative acts, which were based on conflicting national law.¹⁰⁷² However, even after the ruling in *Nicolo*, the *Conseil d'État* remained reluctant to declare Acts of Parliament in breach of superior rules of law, i.e. for example with respect to EC directives.

In this context, a general distinction needs to be drawn between two different hypotheses: first, instances when the damage results from the application of a specific law, which is in conflict with Community law; and second, cases where the complete absence of a law constitutes the violation of Community law. In the case of an ordinary law which conflicts with Community law, some commentators went as far as to propose ways to avoid precisely this question. These evasive actions would apply in cases whenever a claim for damages was brought against the administrative authorities for an act or a decision, which was itself based on the specific legal provision in conflict with Community law. In such a situation, national law would no longer be considered the indispensable link between the Community directive and the administrative act. Hence, the incompatible act or decision by the administration was to be identified as the source of unlawfulness.¹⁰⁷³ However, in the end even commentators had to admit that if one extends the claim for damages in a proper manner, one could not disregard the primary responsibility of the legislature.

The jurisprudence initially followed the advanced line of reasoning by academic commentary. Even though it had by then acknowledged that an Act of Parliament could be reviewed for its compatibility with a Community directive, in the case of

¹⁰⁷² *Nicolo*, *supra* note 1068. See also Opinion by M. P. FRYDMAN, *La Semaine Juridique* 1989.II.21371, as well as BROWN and BELL, *French Administrative...*, *supra* note 897, pp. 285 *et seq.*

¹⁰⁷³ See, for example, L. DUBOIS, "La responsabilité de l'Etat pour les dommages causés aux particuliers par la violation du droit communautaire" (1992) *Rev. fr. dr. adm.*, p. 7. The same reasoning was used by Laroque in the tobacco case. See *Philip Morris*, *supra* note 1055, p. 210.

*Société Arizona Tobacco Products*¹⁰⁷⁴ it was not the legislature proper which was held liable, but instead the relevant Government minister on the grounds that he had misused the discretionary power which the Act had conferred upon him in violation of Community law. In fact, according to the *Conseil d'État*'s reasoning, the administrative authorities (responsible for implementing the law) had caused the violation by failing to set aside a law, which was in conflict with Community law.¹⁰⁷⁵ The *Conseil d'État* at that point still tried to adhere to the classical understanding that it had no competence to review legislative acts. Instead, it traced the damage to an administrative act rather than to the national law, on which the act was originally based.

There is, however, one specific case of a breach of Community law by the legislature which simply cannot be based on a subsequent administrative action, i.e. a breach of non-directly applicable Community law, which presents itself in the form of an omission by the national legislature to transpose a Community directive. This scenario is the second hypothesis set out above, where damage is caused by a breach of Community law generated from a complete absence of a national legislative provision.¹⁰⁷⁶ Since French law did not offer a solution in itself, according to commentators, a new framework of liability for legislative breaches would have to be introduced for precisely those cases.¹⁰⁷⁷ The extension of the existing framework of liability certainly went far beyond what the administrative judge had foreseen in the

¹⁰⁷⁴ *Philip Morris*, *supra* note 1055, p. 210.

¹⁰⁷⁵ VAN GERVEN *et al.*, *Tort Law*, *supra* note 238, p. 364; DONY, "Le Droit...", *supra* note 893, p. 269.

¹⁰⁷⁶ According to DUBOIS, "La responsabilité...", *supra* note 1073, p. 7.

¹⁰⁷⁷ Pretot proposes that the regime of liability *sans faute* should be applied for breaches of Community law by the legislature, whereas the special conditions required in the case of *responsabilité sans faute* for administrative breaches, i.e. the occurrence of a special and exceptional damage, should not be interpreted in a strict sense. This solution would satisfy the demands of the CJEU, but at the same time respect the principle of indisputability of the law (in *note sous Cour administrative d'appel Paris, 1 juillet 1992, Sté Jacques Dangeville, AJDA 1992*, p. 768). The idea of introducing the regime of liability *sans faute* has been categorically rejected by other authors. In this context see, *inter alia*, D. SIMON, "Droit communautaire et responsabilité de la puissance publique: glissements progressifs ou révolution tranquille?", *AJDA 1993*, p. 235. His view is that the legislature should also be included in the regime of liability *pour faute* since it is violating a norm, which is superior to it in the legal hierarchy, i.e. a norm of Community law. In a similar manner, Christine Bertrand states that at the moment of a legislative breach of Community law, the national administrative judge should not have any difficulty in classifying the violation as committed with fault (in "La responsabilité des États membres en cas de non transposition de directives communautaires", *RDP, 1994-1995*, p. 1507).

judgment of *La Fleurette*.¹⁰⁷⁸ However, it was reinforced by the decisions in *Brasserie du Pêcheur* and *Factortame III*, which both affirmed that “*le principe selon lequel les Etats membres sont obligés de réparer les dommages causés aux particuliers par les violations du droit communautaire est applicable lorsque le manquement reproché est attribué au législateur national.*”¹⁰⁷⁹ According to the reasoning of the *Conseil d’État*, State liability for legislative breaches would therefore only apply in cases of legislative omission.¹⁰⁸⁰ But even in those cases, liability has so far only ever been found under the conditions outlined in *La Fleurette*.

Rather problematically, the strict prerequisites that are necessary in order to invoke liability *sans faute* do not appear to fulfil the conditions of the effective protection of rights required by the CJEU. In fact, non-fault liability *à la Fleurette* seems to be in conflict with the jurisprudence of the CJEU and the principles established in its *Francovich* ruling.¹⁰⁸¹ In 1992, the French courts were finally confronted with a fundamental case, which did not allow for a derivation from the question of whether the State could be held liable for breaches of Community law by the national legislature. At the same time, this case also had broader ramifications for this thesis’ key question concerning the State’s liability for judicial breaches of Community law, which will be the object of study in the following section.¹⁰⁸²

In the case of *Dangeville*,¹⁰⁸³ the legislature had failed to transpose a Community directive, the Sixth VAT Directive,¹⁰⁸⁴ into national law before the

¹⁰⁷⁸ See previous analysis of the judgment under FN 955.

¹⁰⁷⁹ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 36: “[...] the principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the breach in question.”

¹⁰⁸⁰ WOLF, *Staatshaftung*, *supra* note 909, p. 272.

¹⁰⁸¹ In a similar manner, Laroque, in her conclusions in the tobacco case (*Philip Morris*, *supra* note 1055, p. 210), had also raised the concern that the CJEU’s jurisprudence in *Francovich* might be irreconcilable with the French regime of no-fault liability. This concern resulted from the fact that liability *sans faute* would presuppose the existence of a special and exceptional damage. See also WURMNEST, *Grundzüge...*, *supra* note 23, p. 47.

¹⁰⁸² See following section of this chapter.

¹⁰⁸³ CAA Paris, *Dangeville*, *supra* note 1077, p. 768. See also the Opinion in this case by Bernault, JCP 1993, I, n°3645.

required deadline. In its judgment, the *Cour administrative d'appel* explicitly confirmed that the State was indeed liable for the damage incurred by the shortfall of the legislative authorities. However, the Court declared this without ruling on the question of fault. Nevertheless, some authors have speculated that in this case the *Cour administrative d'appel* had actually applied the regime of liability *pour faute*.¹⁰⁸⁵

With respect to the *status quo*, the *Conseil d'État* still traditionally applies the device of liability *sans faute* when it comes to breaches of law by the legislature. However, over time there has been a partial change of direction in the case-law towards the application of a regime of liability *pour faute*. The latter development has so far only taken place in the context of legislative breaches of Community law. In fact, on the basis of Article 55 of the Constitution, the *Conseil d'État* now carries out an implicit control of legislative measures. There have also been proposals to introduce a requirement of *faute lourde* in order to limit the application of liability *pour faute* in cases of violations committed by the legislature.¹⁰⁸⁶ Until now there has been no final word on this issue. Although the enactment of liability *sans faute* for an omission by the legislature would be conceivable in the context of Community law, it is nowadays neither used nor is it dogmatically correct.¹⁰⁸⁷ So far, liability *sans faute* remains the only regime that has been explicitly applied in the jurisdiction of the highest courts when it comes to legislative inaction or omission.¹⁰⁸⁸

On a theoretical basis, Muscat¹⁰⁸⁹ suggests that with respect to the liability regime applicable in the case of legislative breaches of EC law, we are faced with

¹⁰⁸⁴ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes; hereinafter "Sixth VAT Directive".

¹⁰⁸⁵ See for example HELENE MUSCAT, *Le droit français de la responsabilité publique face au droit européen* (Paris, L'Harmattan, 2001), p. 292 and CHAPUS, *Droit Administratif...*, *supra* note 898, p. 1325.

¹⁰⁸⁶ WOLF, *Staatshaftung*, *supra* note 909, p. 281.

¹⁰⁸⁷ *Ibid.*, p. 279. However, this opinion is still disputed by part of the literature. For a sceptical view, see for example Dutheil de la Rochère, CMLR 30 (1993) p. 197; Prétot, AJDA 1992, pp.770 *et al.* See also the implicit acknowledgment of State liability for legislative breaches in CAA Paris, Dangeville, *supra* note 1077, p. 768.

¹⁰⁸⁸ WOLF, *Staatshaftung*, *supra* note 909, p. 278.

¹⁰⁸⁹ MUSCAT, *Le droit français de la responsabilité*, *supra* note 1085, p. 286.

three options. The first solution entails a generalization of the basic idea of lack of responsibility of the legislature as shown in the case of *Arizona Tobacco products*.¹⁰⁹⁰ The way to avoid targeting the legislature in a direct manner would be to identify an administrative act that would constitute the link between the law and the damage sustained by an individual. The administrative act would then form the basis of the liability claim, which would be directed against the administrative authorities instead of the legislature. However, it remains rather doubtful whether the exercise of bypassing the true perpetrator presents the most viable solution under French law. Nevertheless, Advocate General Tesauo had considered this approach in his conclusions in the case of *Brasserie du Pêcheur*.¹⁰⁹¹ The second alternative advanced by Muscat consists in the central idea of maintaining the mechanism of liability *sans faute* and at the same time removing the requirement of the damage to be of abnormal and special character. This solution is propagated by many authors, who refuse to submit the legislature to a liability regime *pour faute*. In this case, a dual track system of responsibility for legislative breaches would be established. Accordingly, the procedure for cases with a Community law component on the one hand would exist alongside the purely domestic legal framework on the other. A final solution brings the legislature into the framework of responsibility *pour faute*.¹⁰⁹²

Overall, it would appear that Community law is inducing a revolutionary development in French law in the field of State liability for legislative breaches. The ruling of the CJEU in the case of *Francovich* has reinforced the necessity of reform with respect to the question of liability for breaches committed by the legislature. Despite the supportive voices, the *Conseil d'État* so far has never actually applied this concept in any of its rulings. While the case of *Dangeville* represented for many a missed opportunity to move forward in this direction,¹⁰⁹³ one might nevertheless be

¹⁰⁹⁰ *Philip Morris*, *supra* note 1055, p. 210.

¹⁰⁹¹ Opinion Advocate General Tesauo in C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 42 and 43.

¹⁰⁹² As in MUSCAT, *Le droit français de la responsabilité*, *supra* note 1085, p. 286.

¹⁰⁹³ As the reader will recall, in this case the *Cour administrative d'appel* confirmed the liability of the State, without, however, explicitly identifying the “culprit” responsible for the breach.

able to detect some positive signals in the courts' practice, which hint at a possible change in its line of jurisprudence.¹⁰⁹⁴

II. State Liability for Judicial Breaches under French Law after *Köbler*

After an exhaustive discussion of the implications of Member State liability for breaches of Community law by the administrative authorities and the legislature in France, it is now appropriate to undertake a detailed assessment of the reoccurring debate concerning the State's liability for breaches of (Community) law by the judiciary. As will now be shown, French law has traditionally been rather reluctant to recognize the liability of the State for judicial acts. Consequently, the implementation of the *Köbler* doctrine in France will pose an even greater hindrance to overcome.

1. Application of the domestic framework for judicial breaches *ceteris paribus*?

Similar to the case of legislative breaches of EC law, the initial challenge for the application of the *Köbler* doctrine in France is to find a procedural avenue under domestic law, by which liability for breaches of Community law by the judiciary can be invoked. In short, in France as in all EU Member States, we are faced with the essential question of how to 'transplant' this newly established Community principle into the existing national procedural framework. Moreover, if this proves impossible, what the remedial structures would need to be created in order to secure the full implementation of the Community rights under French law.

While, as previously demonstrated, the case-law has given some vague indications in terms of which national procedural substructure to apply for cases of State liability for breaches by the French legislature, we are still venturing into unexplored territory when it comes to defining a suitable basis for the application of the *Köbler* doctrine in domestic law. The principle of national procedural autonomy generally begs the question as to whether the domestic legal requirements concerning State liability for judicial breaches of national law are in compliance with the

¹⁰⁹⁴ In this context see also *CE*, 8 février 2007, *Gardedieu*, n° 279522, *Juris-Data* n°2007-071434.

minimum framework conditions established at the Community level. Our analysis will aim to uncover these potential tensions between the core prerequisites of Community law and the procedural and substantive setting of national law. This standard procedure, which could be called a “compatibility test”, would eventually have to be performed in all the Member States in order to guarantee a comprehensive realisation of the Community rights under national procedural law.¹⁰⁹⁵

In the following section, we will therefore attempt to anticipate the possible conversion of the *Köbler* principle into the procedural framework in France in the following manner. As a first step, a direct contrast of the framework of State liability under French law, and the specific parameters developed by the CJEU in the *Köbler* doctrine, will help to identify the possible causes of the incommensurability between the two systems. The aim is to evaluate the national framework by means of the Community requirements as formulated in *Köbler* and to provide a satisfactory answer to the question of whether the national legal framework of State liability in France complies with the minimum standards set up by the CJEU. In other words, the following analysis seeks to evaluate whether the public liability regime for judicial breaches in France constitutes a satisfactory tool for the transposition of the Community right into domestic law, or whether adjustments to the internal legal framework need to be considered. In case there is a need to reframe the existing structures, one would have to consider creating a separate procedural track to be accessible for individuals under national law. The latter not only needs to be in conformity with the increasingly complex stratification of the judicial organisation in France, but would also have to adhere to the requirements set out in the jurisprudence of the CJEU.

a) Procedural considerations under the French judicial framework: *quis iudicabit?*

The ‘toolbox’ of possible national legal bases to accommodate the concept of public liability for judicial breaches of EC law is especially diverse and complex in

¹⁰⁹⁵ We will be looking at possible procedural barriers in chapter VI.

France. Due to the fundamental principle of the separation of courts, we are essentially faced with two different frameworks of State liability, both of which might in theory constitute a suitable legal basis. However, while at first glance there seem to be too many feasible alternatives, the rules pertaining to the principle of separation of courts in France already limit the number of possible options. The strict separation of competences in this context breeds a divided procedural framework, which is not only decisive for judicial breaches of national law, but which will also lend itself to breaches of EC law by the French judiciary.

Procedurally speaking, there is a neat division between the two judicial orders within which liability claims are also treated separately. In other words, the competence to rule upon questions of public liability with respect to harmful acts committed by the national judiciary is divided under French law. As mentioned in the preceding paragraphs, the administrative judge is competent to rule on any violations within the ambit of his or her own branch of justice, i.e. the *justice administrative*. For the *justice judiciaire*, however, the jurisdiction is divided between the administrative courts for organisational issues pertaining to the ordinary judicial service and the ordinary judicial branch for issues relating to its own functioning.¹⁰⁹⁶ In sum, a holistic analysis of the application of the *Köbler* principle under French law requires us to consider two different hypotheses: State liability for breaches of Community law generated by the *justice administrative* on the one hand, and public liability incurred by the *justice judiciaire* on the other.

Where a liability claim is brought by an individual, administrative courts are not competent to rule on the question of State liability if the source of the violation consists in an act or a judgment by a civil court. Similarly, the *justice judiciaire* is not competent to decide upon public liability claims with respect to alleged breaches of law by one of the administrative courts. Therefore, a breach of EC law by a national court in France could easily lead to a situation where a French court of first instance, affiliated to one of the two judicial branches, would be confronted with the task of deciding upon an individual's claim for compensation by the State for a harmful act

¹⁰⁹⁶ DEBBASCH and COLIN, *Droit Administratif*, *supra* note 893, p. 556.

committed by a court belonging to the same judicial hierarchy. The principle of the strict separation of courts in France, gives rise to a procedure whereby an administrative or ordinary court competent to rule in first instance would be charged with the task of reviewing – even though in an indirect manner – the respective judgment, which had previously been proclaimed by a higher court within the same judicial branch. The strict division of competences in this respect certainly raises a number of intricate problems and procedural complications concerning the application of the *Köbler* doctrine. With due respect to the principle of national procedural autonomy, the central question is therefore: *Quis iudicabit?*

First, when looking at the procedural rules pertaining to the *justice administrative*, we are faced with the following situation under national law. For reasons outlined in the previous paragraphs, an individual's claim for compensation has to be lodged with an administrative court whenever the violation has been committed by the *justice administrative*. In fact, according to the criteria spelled out in Articles 312 to 314 of the *Code de Justice Administrative*, the competent court has to be at the level of a *cour administrative*.¹⁰⁹⁷ The procedural competence for claims of such sort has been reconfirmed in practice in a number of instances such as in the cases of *Pierrot*, *Consorts Lévi* and *Fouriat*, discussed above.¹⁰⁹⁸ In all of these cases an individual's claim for damages was based on a decision taken by an administrative court and in all of them the application was lodged in first instance at an administrative court, i.e. the *tribunal administratif de Nancy*, the *tribunal administratif de Lille* and the *tribunal administratif de Marseille* respectively.

¹⁰⁹⁷ Article R.312-14 *Code de Justice Administrative*: “Les actions en responsabilité fondées sur une cause autre que la méconnaissance d'un contrat ou d'un quasi-contrat et dirigées contre l'Etat, les autres personnes publiques ou les organismes privés gérant un service public relèvent:
(1) Lorsque le dommage invoqué est imputable à une décision qui a fait ou aurait pu faire l'objet d'un recours en annulation devant un tribunal administratif, de la compétence de ce tribunal;
(2) Lorsque le dommage invoqué est un dommage de travaux publics ou est imputable soit à un accident de la circulation, soit à un fait ou à un agissement administratif, de la compétence du tribunal administratif dans le ressort duquel se trouve le lieu où le fait générateur du dommage s'est produit;
(3) Dans tous les autres cas, de la compétence du tribunal administratif dans le ressort duquel se trouvait, au moment de l'introduction de la demande, la résidence de l'auteur ou du premier des auteurs de cette demande, s'il est une personne physique, ou son siège, s'il est une personne morale.”

¹⁰⁹⁸ CE, 12 novembre 1980, *Pierrot*, RD publ. 1981.1118; CE, 12 octobre 1983, *Consorts Lévi*, Rec. p. 406 and CAA Lyon, 28 décembre 1990, *Mme Fouriat*, Rec. p. 963.

Nevertheless, to a certain degree these cases constitute exceptions, in the sense that even though the violation which was at the basis of the individual's claim for compensation originated from the *justice administrative*, the responsible entities were not part of the administrative jurisdiction of general competence (*juridictions à compétence générale*), but administrative courts with specialised competences (*juridictions à compétence spécialisée*). The latter courts only have limited jurisdiction, being confined to a specific sphere of administrative law.¹⁰⁹⁹ While this fact is insignificant in terms of the individual's right to compensation, it has some relevance with respect to the procedure followed in the case. These precedents never concerned a situation where an individual had been harmed by a decision or act of an administrative court of general competence, i.e. *les tribunaux administratifs*, *les cours administratives d'appel* or the *Conseil d'État*. Consequently, the administrative courts of first instance competent to deal with the individual's claim were only forced to review - in an indirect manner - decisions taken by specialised courts, which are somewhat separate from the direct hierarchical order of the jurisdiction of general competence.

The idea that in the course of an individual's claim for damages a *tribunal administratif* would have to rule on the commission of a *faute grave* by a *cour administrative d'appel* or even the *Conseil d'État* itself seems unthinkable in theory and lacks any precedent in practice. Such an incidence would upset the long-established system of judicial hierarchy in France. In fact, that a court at the bottom of the judicial order should be competent to rule whether a hierarchically superior court has committed a *faute grave* in one of its judgments seems to contradict all basic logic.¹¹⁰⁰ Nevertheless, and especially from the perspective of Community law, this possibility has to be taken into account, not least in order to provide a remedy for an

¹⁰⁹⁹ In fact, at the origin of the claims for State liability in these cases were the *Conseil départemental* and the *Conseil régional de l'ordre des chirurgiens-dentistes* (in the case of *Fouriat*) on the one hand, and the *Commission de contrôle des banques* (in the cases of *Pierrot* and *Consorts Lévi*) on the other. Both entities were acting in their judicial function.

¹¹⁰⁰ The problem of the established hierarchy of courts appears to be a reoccurring theme in a number of Member States in relation to the *Köbler* ruling. Already in 1991, an extensive analysis of this debate has been presented by Advocate General Vélú in his Opinion in the case *Cass. (1^{re} ch.)*, 19 déc. 1991, *De Keyser*, *supra* note 232, in which he attempts to dispute the common argument and widespread fear of a possible disturbance of the national judicial hierarchy.

individual who bases his or her claim (by analogy to the *Köbler* case) on a breach of Community law by a higher court.

There appears to be no explicit procedural rule in the French *Code de Justice Administrative*, which provides a solution to this specific predicament. In the absence of clear normative guidelines, a court of first instance confronted with such a claim could choose to proceed in several ways. In a case concerning Community law, the administrative court of first instance could ask for a preliminary ruling by the CJEU on the basis of Article 234 EC. This would certainly not solve the procedural problem, but at least the CJEU could relieve some of the court's burden of having to question a decision taken by a higher court. However, strictly speaking the CJEU would not be competent to decide the case.

Besides the possibility of referring a preliminary question to the CJEU, which is after all only an option in a case with Community-law relevance, the French court of first instance could resort to a similar procedure provided under national law, which is regulated in Article L.113-1 *Code de Justice Administrative*.¹¹⁰¹ According to this procedure, a *tribunal administratif* or a *cour administrative d'appel* may refer an unresolved question of law, which is necessary in order to resolve the specific case, to the *Conseil d'État*. The *Conseil d'État* can then rule in the form of an *avis* on the point of law within three months. Meanwhile, the hearing of the case in the lower court would be suspended.¹¹⁰²

¹¹⁰¹ "Avant de statuer sur une requête soulevant une question de droit nouvelle, présentant une difficulté sérieuse et se posant dans de nombreux litiges, le tribunal administratif ou la cour administrative d'appel peut, par une décision qui n'est susceptible d'aucun recours, transmettre le dossier de l'affaire au Conseil d'Etat, qui examine dans un délai de trois mois la question soulevée. Il est sursis à toute décision au fond jusqu'à un avis du Conseil d'État ou, à défaut, jusqu'à l'expiration de ce délai."

¹¹⁰² 'Les avis contentieux' of the *Conseil d'État* were originally regulated in Article 12 de la loi de réforme du contentieux du 31 décembre 1987 et le décret d'application n°905 du 2 septembre 1988. Now the procedure is regulated in the *Code de justice administrative* in Articles L.113-1 and R.113-1 to 4. Detailed information on the concept and application of an *avis contentieux* is provided in RENE CHAPUS, *Droit du contentieux administratif*, 10th ed. (Paris Montchrestien, 2002), p. 699. An analogous system has also been set up with respect to the *justice judiciaire*. On the basis of the *Loi du 15 mai 1991* and the *Décret du 12 mars 1992* also ordinary courts of lower instance can now refer questions of interpretation to the *Cour de Cassation*.

In this manner, a court of first instance confronted with a similar situation as previously outlined, could refer a question for interpretation to the *Conseil d'État*. The latter would then be charged with designating the judicial instance competent to rule in the case. A first possibility would be for the *Conseil d'État* to pronounce itself competent. After all, there already exists a comparable situation under French law regulated in Article R.311-1 *Code de Justice Administrative*, in which the *Conseil d'État* is declared competent in first and last instance to rule on cases of State liability for excessive length of proceedings.¹¹⁰³ Similar to the issue at stake, the competence spelled out in this provision is also connected to a claim for compensation by an individual. Since the time delay in the course of the judicial proceedings might have been even caused by the *Conseil d'État* itself, the legislature seemingly did not perceive this possibility to be in conflict with the *Conseil d'État*'s general competence to rule on precisely these cases. Nevertheless, and it appears to be a rather tilted logic that the *Conseil d'État* could declare itself competent to rule on liability claims based on alleged violations of law committed by it.

A second possible option, which steers away from the general competence of the *Conseil d'État*, would be to give a separate judicial entity the competence to rule over all cases of State liability for breaches of (Community) law by the *justice administrative* in general. Alternatively, the designated court or tribunal could at least decide in instances where the *Conseil d'État* itself turns out to be responsible for the breach. In fact, a similar proposal has been made in Austria.¹¹⁰⁴ Furthermore, the author has already suggested such a possibility for the case of England, where a mediating judicial instance could also be charged with the specific task of ruling in cases of judicial breaches of Community law.¹¹⁰⁵ Procedurally speaking, two potential alternatives for a suitable and impartial judicial entity in France, which could possibly be attributed the competence to rule at least in cases where the claim for State liability

¹¹⁰³ Article R.311-1 *Code de Justice Administrative*: “Le Conseil d'État est compétent pour connaître en premier et dernier ressort:[...] (7) Des actions en responsabilité dirigées contre l'État pour durée excessive de la procédure devant la juridiction administrative;”

¹¹⁰⁴ On the proposal to reintroduce the ‘*Austrägalssenat*’ under Austrian law see chapter IV, pp. 211 *et seq.*

¹¹⁰⁵ See chapter IV.

is based on a manifest breach of law committed by the *Conseil d'État* itself, are the *Tribunal des Conflits* or the *Cour de Justice de la République*.¹¹⁰⁶

The *Cour de Justice de la République* was established by constitutional amendment on 27 July 1993 based on Articles 68-1 and 68-2 of the French Constitution. It consists of fifteen members, twelve of whom are members of the French Parliament, who are elected by the National Assembly and the Senate respectively. The remaining three members are chosen from among the judges of the *Conseil d'État*. Together with the *Haute Cour de Justice*, the *Cour de Justice de la République* forms a separate jurisdictional order under French law, which is referred to as the *juridiction politique*. The Court's main competence consists in deciding upon applications by individuals who claim to be a victim of a crime or other serious offence committed by a member of the government in the exercise of his or her duties. However, due to its status and its well-balanced composition, it would be feasible to extend the Court's competences beyond the mere duty of holding members of the government accountable for their actions. The idea would be to assign the Court of Justice of the Republic the additional task of ruling upon questions of State liability for judicial breaches in general, or at least for breaches of law by a court of final instance. Hence, the *Cour de Justice de la République* would be competent to decide upon the question of whether in the specific case the judiciary has committed such manifest breach of law as to justify granting compensation to the individual harmed by the judicial act.

The substantial problem with this proposal, however, is one of procedure. The competences of the *Cour de Justice de la République* have been exhaustively listed in Articles 68-1, 68-2 and 68-3 of the French Constitution. Since the implementation of this proposal would require an extension of the Court's catalogue of competences, implementing it would require a constitutional amendment according to Article 89 of

¹¹⁰⁶ Henceforth, also referred to by the English translation of 'Court of Justice of the Republic', which is used accordingly in the official English translation of the French Constitution (available under www.assemblee-nationale.fr/english/8ab.asp).

the French Constitution.¹¹⁰⁷ Hence, it would certainly by no means be an easy and quick process to put this theoretical model into practice. Despite the obvious hurdles of implementation, however, the competence of the *Cour de Justice de la République* in this context remains a rather complicated, but nevertheless viable option.

A better solution with respect to the existing procedural structures in France might be to award competence in these cases to the *Tribunal des Conflits*. Since there is no mention of the *Tribunal des Conflits* in the French Constitution, an extension of its competences would not require a constitutional amendment, but merely a simple amendment to an ordinary law. In addition, the *Tribunal des Conflits* is also easily accessible to both the *Conseil d'État* and the *Cour de Cassation*. Therefore, this proposed solution would not even necessitate any additional procedural adjustments.

With respect to the *justice judiciaire* the situation in France is rather similar to that outlined in the previous paragraphs on the administrative courts. The case of a breach of (Community) law by the *Cour de Cassation* creates once again a situation in which a court of first instance – in this case presumably a *Tribunal de grande instance* – would be confronted with an individual's claim for damages. In the course of the proceedings, the first instance court would have to decide upon the question of whether the *Cour de Cassation* has committed a manifest breach of (Community) law. Just as for an administrative court of first instance, this certainly constitutes a problem.

Since the *Code de l'Organisation Judiciaire* apparently does not provide for a solution to this practical dilemma, there is a reasonable likelihood that the *Tribunal de*

¹¹⁰⁷ With respect to constitutional changes, Article 89 of the French Constitution reads as follows: “L’initiative de la révision de la Constitution appartient concurremment au Président de la République sur proposition du Premier Ministre et aux membres du Parlement.

Le projet ou la proposition de révision doit être voté par les deux assemblées en termes identiques. La révision est définitive après avoir été approuvée par référendum.

Toutefois, le projet de révision n'est pas présenté au référendum lorsque le Président de la République décide de le soumettre au Parlement convoqué en Congrès ; dans ce cas, le projet de révision n'est approuvé que s'il réunit la majorité des trois cinquièmes des suffrages exprimés. Le bureau du Congrès est celui de l'Assemblée Nationale.

Aucune procédure de révision ne peut être engagée ou poursuivie lorsqu'il est porté atteinte à l'intégrité du territoire.

La forme républicaine du Gouvernement ne peut faire l'objet d'une révision.”

grande instance would choose to proceed in exactly the same manner as previously outlined for the administrative court. Once again, a first option for the court would be to resort to the CJEU via the mechanism provided under Article 234 EC. Moreover, the ordinary court could opt to ask the *Cour de Cassation* to provide guidance in the form of an *avis*. For the *justice judiciaire* the equivalent to Article L.113-1 *Code de Justice Administrative* can be located in Art. L.151-1 *Code de l'Organisation Judiciaire*.¹¹⁰⁸ It would then be for the *Cour de Cassation* to resolve the question of competence. It is rather doubtful that in such a case the *Cour de Cassation* would reconfirm the competence of the first instance court. Instead, the *Cour de Cassation* could declare itself competent to rule in such cases.

However, seen through the procedural lens, it might also be a noteworthy alternative in this case to confer the competence on an impartial judicial instance. Similar to the solution, which has been proposed in the previous paragraphs with respect to the *justice administrative*, the *Tribunal des Conflits* and the *Cour de Justice de la République* are two courts operating outside the ambit of jurisdiction of the ordinary judicial branch on the one hand and the administrative courts on the other. Just like in the case of the *justice administrative*, either one of these two courts would constitute a viable forum for solving the problem. With respect to the competence of the *Cour de Justice de la République*, however, an additional procedural adjustment would need to be made to allow for a direct application to the Court. So far, the *Cour de Justice de la République* can only be consulted after a decision has been rendered by the *Cour de Cassation*. Over and above the required procedural change, the second option would furthermore necessitate – as already outlined before – a constitutional amendment based on Article 89 of the French Constitution in order to allow for an addition to the exhaustive list of competences of the *Cour de Justice de la République*. Under these considerations, the competence of the *Tribunal des Conflits* would appear to be the more feasible option in both cases, i.e. for the *justice judiciaire* as well as the *justice administrative*.

¹¹⁰⁸ The provision is currently under reform and has been annotated with the following mention: “Abrogé par Ordonnance n° 2006-673 du 8 juin 2006 art. 1 *Journal Officiel* du 9 juin 2006 sous réserve art. 3.”

b) Does the domestic requirement of *faute grave* correspond with the notion of manifest breach as required in the *Köbler* case?

One aspect which is vital for the general application of the *Francovich* doctrine, and in particular with respect to the question of State liability for judicial breaches of EC law, is the Court's reading of the two concepts of "sufficiently serious breach"¹¹⁰⁹ and "manifest breach",¹¹¹⁰ which is required by the CJEU as a prerequisite for invoking the liability of a Member State. The requirements laid down by the Court of Justice do not contain an open request for national courts to apply a fault-based assessment in this context.¹¹¹¹ Based on the principle of national procedural autonomy, the Court merely established the general condition of providing for an effective means of remedy for the harmed individual.¹¹¹² Contrary to the idea of a fault-based breach of Community law, the CJEU avoided an explicit reference to the notion of fault in its *Francovich* line of jurisprudence. Instead, the CJEU initially introduced the requirement of a sufficiently serious breach ("*une violation suffisamment caractérisée*")¹¹¹³ of EC law as a core condition for invoking a Member State's liability under Community law.

To answer the question posed by Vandersanden¹¹¹⁴ in this context, according to the established jurisprudence of the CJEU the concept of a sufficiently serious breach cannot be automatically equated with a qualified fault on the part of the perpetrator. In

¹¹⁰⁹ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 51.

¹¹¹⁰ C-224/01, *Köbler*, *supra* note 1, para. 53.

¹¹¹¹ In a similar manner, in the cases C-46 & 48/93, *Brasserie*, *supra* note 4, paras. 78-79, the CJEU stated that: "[...] certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious [...] The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order."

¹¹¹² See in *Ibid*, para. 37 *et seq.*

¹¹¹³ *Ibid*, para. 51.

¹¹¹⁴ "*La notion de 'violation suffisamment caractérisée' du droit communautaire n'est-elle pas, malgré les réserves émises par la Cour à cet égard, l'expression d'une faute lourde qu'il appartiendra de qualifier selon les circonstances propres à chaque action?*" in GEORGES VANDERSANDEN, "Le Droit Communautaire" in G. Vandersanden and M. Dony (eds.), *La responsabilité des États membres en cas de violation du droit communautaire: Études de droit communautaire et de droit national comparé* (Brussels, Bruylant, 1997), p. 60.

fact, the notion of a sufficiently serious breach has to be detached from the concept of fault.¹¹¹⁵ According to the CJEU, the attitude displayed by the national authorities and their allegedly negligent behaviour are not necessarily the decisive elements in the definition of a sufficiently serious breach. In fact, there appears to be a strict dissociation of the concepts of breach and fault on the Community level. This interpretation in turn corresponds to the understanding of fault under French law, where the regime of extracontractual liability is based upon an equation of the notion of fault with a simple illegality.¹¹¹⁶

At this point, however, our analysis will take us even further and focus predominantly on the related, but ostensibly more complex definition of a “manifest breach” – a concept created by the CJEU in the *Köbler* ruling. Introduced by the CJEU as a qualified version of a “sufficiently serious breach”, it constitutes an indispensable pre-condition for invoking Member State liability for breaches of Community law, which were committed by the national judiciary. In the *Köbler* judgment the Court defines the concept of a “manifest breach” by using a descriptive, but non-exhaustive list of attributes, such as “the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.”¹¹¹⁷ Moreover, the Court declared that “an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter.”¹¹¹⁸

Where does the aforementioned definition of a “manifest breach” on the Community level leave us with respect to the general conditions set up under domestic law in France concerning State liability for judicial breaches? At the

¹¹¹⁵ MUSCAT, *Le droit français de la responsabilité*, *supra* note 1085, p. 72.

¹¹¹⁶ *Ibid*, p. 72. In a similar way also BLANCHET, “L’usage de la théorie...,” *supra* note 1037, p. 413.

¹¹¹⁷ C-224/01, *Köbler*, *supra* note 1, para. 55.

¹¹¹⁸ *Ibid*, para. 56.

outset, it should be noted that even for the definition of a manifest breach the CJEU did not resort to the notion of fault. So, once again we are not confronted with a fault-based framework of liability in this context. Under French law, however, the prerequisite for invoking State liability for breaches committed by either branch of the judiciary, the *justice administrative* or the *justice judiciaire*, requires the occurrence of a serious fault or a denial of justice.¹¹¹⁹

Similar to the situation under French law, the CJEU has already been confronted with the question of whether a limitation to State responsibility under national law, which is conditioned upon the occurrence of an intentional fault or serious misconduct, is compatible with the general requirements established in the Court's *Francovich* line, and especially the conditions set out in the *Köbler* ruling. In *Francovich*¹¹²⁰ the CJEU had discussed at length the compatibility of the Italian law on State liability for judicial breaches with the framework conditions established on the Community level.¹¹²¹ First, the Court acknowledged in a general manner that it was legitimate for national law to preclude the incurrence of State liability for judicial breaches according to the nature or the degree of fault involved.¹¹²² However, in the same passage the Court stated that the criteria set up under domestic law could by no means be stricter than those conditions detected in the Court's understanding of a "manifest breach" of the applicable law.¹¹²³ In other words, the conditions established under national law are to be regarded as fully compatible with Community law, if, as in the case of Italy and France, the notion of *faute grave* and denial of justice can be equated with the CJEU's definition of a 'manifest breach'. Obviously, compatibility

¹¹¹⁹ See Article 141-1 *Code de l'Organisation Judiciaire* as well as *Darmont*, *supra* note 1034, p. 542.

¹¹²⁰ C-173/03, *Traghetti*, *supra* note 134, para. 24 *et seq.*

¹¹²¹ *Legge n°117/88 sul risarcimento dei danni cagionati nell'esercizio delle funzioni giudiziarie e responsabilità civile dei magistrati*, GURI n°88, 15 April 1988, p. 3.

¹¹²² C-173/03, *Traghetti*, *supra* note 134, para. 24 *et seq.*

¹¹²³ It is interesting to note at this point that in the French version of the *Köbler* judgment the Court, instead of referring as in English to a "manifest breach" of law, speaks of a "*méconnaissance manifeste*" of the applicable law and thereby once again clearly evades using the notion of fault in this context. See C-224/01, *Köbler*, *supra* note 1, *Sommaire*, point 2.

with Community law is also assumed whenever national law foresees more lenient conditions than the respective requirements set up by the CJEU in *Köbler*.¹¹²⁴

According to Article L.141-1 of the Courts of Justice Act,¹¹²⁵ the classification of “*faute lourde*” or denial of justice under French law was always conditioned by the circumstances of each individual case and inevitably by the subjective perception of the facts of the case by the competent judge.¹¹²⁶ In the present context, this interpretation has to be reconciled with the CJEU’s understanding of a manifest breach of Community law. In order to satisfy the latter definition,

the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.¹¹²⁷

In short, according to the *Köbler* doctrine, the elements of *serious fault* and *denial of justice* under French law cannot be more restrictive than the notion of a *manifest breach* under Community law.

¹¹²⁴ See Ibid, para. 57; SIMON, “Consolidation de la responsabilité...,” *supra* note 102, p. 10.

¹¹²⁵ Expression used as translated by P. Larouche in VAN GERVEN *et al.*, *Tort Law*, *supra* note 238, p. 383.

¹¹²⁶ CHAPUS, *Droit Administratif...*, *supra* note 898, pp. 1329-1330.

¹¹²⁷ C-224/01, *Köbler*, *supra* note 1, paras. 54-55.

c) Additional hurdles to overcome under French law

Analysing the jurisprudence developed by the *Conseil d'État* with respect to public liability for breaches of law by the *justice administrative*, one has to raise serious doubts whether the framework set up by the *Conseil d'État* in its precedent *Darmont*¹¹²⁸ complies with the standards laid down in *Köbler*. It is not the requirement of a serious fault that is in conflict with the *Köbler* doctrine, but an additional rule set up by the *Conseil d'État* in *Darmont* excluding State liability in cases where the qualified fault results from the content of a definite judgment itself.¹¹²⁹ In such a case, the authority directly linked to the judicial decision in question is protected from liability claims if the judgment has become final and therefore has achieved the status of *res judicata*.¹¹³⁰ As mentioned before, René Chapus even went as far as to argue that the same type of limitation with respect to judicial mistakes should apply to violations incurred by the *justice judiciaire*. In other words, breaches of law, which were rooted in the content of a judgment that had acquired the status of *res judicata*, should be exempted from State liability claims also with respect to (what is now) Article 141-1 *Code de l'Organisation Judiciaire*.¹¹³¹

In light of the CJEU's recent ruling in *Traghetti*,¹¹³² parallels between the Court's evaluation of the restrictions established under Italian law and the hurdles set up by the French regime of State liability might become evident. In this judgment, the CJEU was confronted with the preliminary question of whether the affirmation of State liability was "impeded in a manner incompatible with the principles of

¹¹²⁸ *Darmont*, *supra* note 1034, p. 542.

¹¹²⁹ "[L]'autorité qui s'attache à la chose jugée s'oppose à la mise en jeu de cette responsabilité, dans le cas où la faute lourde alléguée résulterait du contenu même de la décision juridictionnelle et où cette décision serait devenue définitive." In *Ibid*, p. 542. The rule, which had been established in the case of *Darmont* has later been confirmed in the judgments of *Pierrot* (CE, 12 novembre 1980, RD publ. 1981.1118), *Consorts Lévi* (CE, 12 octobre 1983, Rec. p. 406) and *Mme Fouriat* (CAA Lyon, 28 décembre 1990, Rec. p. 963).

¹¹³⁰ DONY, "Le Droit...", *supra* note 893, p. 247. See also CHAPUS, *Droit Administratif...*, *supra* note 898, n°1280; DEBBASCH and COLIN, *Droit Administratif*, *supra* note 893, p. 559.

¹¹³¹ CHAPUS, *Droit Administratif...*, *supra* note 898, p. 1333. As already discussed earlier, the proposal to extend this principle to the ambit of the *justice judiciaire* remains very contested. On this issue see also DONY, "Le Droit...", *supra* note 893, p. 247.

¹¹³² C-173/03, *Traghetti*, *supra* note 134, paras. 1 *et seq.*

Community law by national legislation on State liability for judicial errors which precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions.”¹¹³³ The latter restrictions were precisely those that applied to State liability claims for judicial breaches under Italian law. In its ruling, the CJEU stipulated that any such invasive restriction on State liability was incompatible with Community law. Not only would it weaken the procedural guarantees of individuals under EC law, but considering that a large part of the court of last instance’s duty consists in interpreting and assessing the applicable law and facts of the case, a domestic restriction of this kind would be too invasive and would render the *Köbler* doctrine obsolete.¹¹³⁴

In anticipation of the *Köbler* ruling, Blanchet¹¹³⁵ had already speculated in an article published in 2001, that in the context of Community law, an additional limitation on the affirmation of State liability for judicial breaches like under French law, i.e. excluding liability in cases where the qualified fault resulted from the content of a definite judgment, would surely violate the principle of effectiveness as formulated by the CJEU in its decision in *Palmisani*.¹¹³⁶ In fact, this limitation, found in the jurisprudence of the *Conseil d’État*, is rather similar to the heavy restraints of normative restrictions established under Italian law, whose compatibility the CJEU recently discussed in the case of *Traghetti*.¹¹³⁷

Even though the CJEU has repeatedly underlined that “the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules and on the fact that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by

¹¹³³ Ibid, para. 20.

¹¹³⁴ Ibid, para. 36.

¹¹³⁵ BLANCHET, “L’usage de la théorie...,” *supra* note 1037, p. 435.

¹¹³⁶ C-261/95, *Palmisani*, *supra* note 430, para. 27: “[T]he conditions [...] for reparation of loss or damage laid down by national law must not be so framed as [...] to make it virtually impossible or excessively difficult to obtain reparation.”

¹¹³⁷ C-173/03, *Traghetti*, *supra* note 134, para. 24 *et seq.*

Community law,”¹¹³⁸ the exclusion of State liability for final judgments under French law goes beyond the permissible conditions defined by the CJEU in the cases of *Köbler* and *Traghetti*. In analogy to the Italian case, the restriction on State liability under French law, which had been established in the case of *Darmont*, is probably not tenable with respect to State liability claims for breaches of Community law by the *justice administrative*.¹¹³⁹ Subsequently, the proposal to apply a similar restriction to judgments by the *justice judiciaire* would also become obsolete. Moreover, a noteworthy argument of Blanchet is the question of how the maxim of *res judicata* could possibly impede the realisation of State liability claims, when at the same time this principle does not seem to hinder the European Commission starting an infringement procedure on the same grounds.¹¹⁴⁰ However, until now these statements and predictions constitute mere speculation, which we will only be able to judge when the CJEU speaks out clearly on the compatibility of the French framework of State liability with the requirements of Community law.

d) The *Conseil d'État*'s policy of 'splendid isolationism'¹¹⁴¹ - the end of an era?

The rather unique development and the distinct structure of the French public liability regime collide with a strong tradition of judicial protectionism in France.¹¹⁴² The potential influence of outside legal sources upon the principles of French public and private law was traditionally counterbalanced by the French judiciary and its strong focus upon national legal concepts. In light of this tradition, it is therefore not surprising that the *Conseil d'État* was at first rather hesitant to give full effect to (overriding) EC law principles in general and the established Community principle of non-contractual liability in particular. The domestic framework of public liability was initially shielded from any potential outside influence or modifications by European

¹¹³⁸ Ibid, para. 31.

¹¹³⁹ For support for this position, see also SIMON, "Consolidation de la responsabilité...", *supra* note 102, p. 10.

¹¹⁴⁰ BLANCHET, "L'usage de la théorie...", *supra* note 1037, p. 435.

¹¹⁴¹ DENYS SIMON, "La jurisprudence récente du Conseil d'État: le grand ralliement à l'Europe des juges?" (2007) *Europe*, p. 5.

¹¹⁴² Frydman in his Opinion in the case *Nicolo*, *supra* note 1068.

Community law. Moreover, despite concerns among academic commentators that such protectionist approach would eventually isolate the French judiciary from a growing network of judicial cooperation in the EU, the *Conseil d'État* was until recently reluctant to compromise upon its status as the supreme judicial organ and the highest jurisdiction in France in matters concerning the administration and the State. In order to hinder the full application of Community law which would eventually prevail over national law and over its own *dicta*, the *Conseil d'État* on various occasions simply chose to bypass overriding EC law principles in its jurisprudence.¹¹⁴³

i) The Conseil d'État and the question of preliminary rulings under Art. 267(3) TFEU

A prime example of isolationist judicial practice in France was the *Conseil d'État*'s (non-)compliance with its obligations under Art. 267(3) TFEU, i.e. the Court's well-defined obligation to refer questions for a preliminary ruling to the CJEU. In this context, Pierre Pescatore has statistically analysed that within a period of thirty years of Community law practice in France, the *Conseil d'État* has made a total of a mere seven referrals to the CJEU for preliminary rulings under Article 234(3) EC. In contrast to 25 cases within the same timeframe in which it either refused to do so or simply ignored the possibility. These numbers can be contrasted with 35 referrals made by the *Cour de Cassation* within the exact same period of time.¹¹⁴⁴ Comparable figures had already been presented in an earlier analysis by Bruno Genevois.¹¹⁴⁵ His findings show that to 1 July 1980 the *Conseil d'État* invoked of Article 234(3) EC in only five out of 24 cases with Community law relevance. In a critical view of the Court's practice, Genevois already predicted in the early 1980s what has in fact been confirmed today, namely that "[l]a doctrine verra sans doute dans le nombre restreint des renvois à la Cour de justice des Communautés

¹¹⁴³ SIMON, "La jurisprudence....," *supra* note 1141, p. 5.

¹¹⁴⁴ See discussion of (former) Article 177 EC in V. CONSTANTINESCO *et al.*, *Traité instituant la CEE: commentaire article par article* (Paris, Economica, 1992), p. 1103, which comprehensively outlines the averse position of the *Conseil d'État*.

¹¹⁴⁵ BRUNO GENEVOIS, "Le Conseil d'État et l'ordre juridique communautaire" (1979-1980) *Etudes et Documents du Conseil d'État* 31, p. 73.

européennes une confirmation de l'idée selon laquelle le Conseil d'État ferait preuve de nationalisme ombrageux."¹¹⁴⁶ In addition to turning a blind eye to its obligation to refer under Article 234(3) EC, the *Conseil d'État* occasionally even went as far as to rule contrary to Community law in a judgment with Community law relevance.¹¹⁴⁷

Until recently, the CJEU had silently condoned this practice. However, the recent developments in its *Köbler* ruling might from now on provoke a firm and swift response by the CJEU to such overt defiance of EC law by the *Conseil d'État* or any other national court of last instance. And this time around it would be the established concept of non-contractual liability on the Community level having the decisive impact on French judicial practice. In the future, the CJEU could resort to its self-proclaimed *Köbler* doctrine as an effective means of punishing non-compliant national courts of last instance which act in violation of Article 234(3) EC. As mentioned before, the CJEU had explicitly stated in *Köbler* that a violation of the obligations enshrined in Article 234(3) EC Treaty by a national supreme court would serve as a sufficient ground to invoke the responsibility of the State for a breach of Community law.¹¹⁴⁸ With this sword of Damocles hanging over EC-related judgments, national supreme courts might have received the necessary impetus for increased compliance with EC law, and especially with their obligations under Article 234(3) EC. The full impact of the CJEU's proclamation in *Köbler* will however only unfold once the Court has actually put this sanction mechanism into practice. After all, actions always speak louder than words.

ii) The arrival of a "golden age"?

Overall, one can observe that especially in the past few years the *Conseil d'État*'s hesitation in granting unconditional effect to EC law principles has been replaced with a more conciliatory attitude by the *Conseil* towards EC law and the Court of Justice of the EU as such. Thereby, the communication between the two

¹¹⁴⁶ Ibid, p. 74, where Genevois predicts that a restricted number of referrals by the *Conseil d'État* to the CJEU will confirm the fact that the *CE* is guilty of an incorrigible nationalism.

¹¹⁴⁷ *CE, Ass.*, 22 décembre 1978, *Ministre de l'Intérieur c/ Cohn-Bendit*, D.1979.155, *concl.* Genevois.

¹¹⁴⁸ C-224/01, *Köbler*, *supra* note 1, para. 55.

courts appears to be steadily improving over time.¹¹⁴⁹ In fact, in a recent article Denys Simon¹¹⁵⁰ already predicted the arrival of a “golden age” in the relations between the *Conseil d’État* and the CJEU, adding that the judicial bond between Paris and Luxembourg had never been stronger than now. Simon reached his optimistic conclusion after the analysis of two rather recent judgments by the *Conseil d’État* in the cases *Gardedieu*¹¹⁵¹ and *Arcelor*,¹¹⁵² as well as a similar ruling by the *Conseil* of 11 December 2006.¹¹⁵³ In these specific cases, the *Conseil d’État* not only fully adhered to its obligations under EC law, but also partly overruled its longstanding jurisprudence in order to make way for the full effectiveness of Community law.

Firstly, the decision of 11 December 2006 in the case *Sté de Groot en Slot Allium BV*¹¹⁵⁴ altered the *Conseil d’État*’s habitual tactic of restricting the full authority of those preliminary rulings by the Court of Justice, in which the CJEU’s *dictum* had reached beyond the ambit of the national court’s preliminary questions. In that judgment the *Conseil* suddenly changed its course of action insofar as it confirmed that any preliminary ruling by the CJEU – even one where the Court had overstepped its competences – was vested with the full authority of *res judicata* and was strictly binding on the respective national judge. Only shortly afterwards, in the *Gardedieu* judgment¹¹⁵⁵ the *Conseil* also revised its petrified stance on the general concept of State liability for legislative breaches. Apart from the regular application of the principle of *responsabilité sans faute* in such cases, the *Conseil d’État* finally acknowledged the concept of State liability for legislative breaches in a case where the implementation of a law violated an international agreement. Nevertheless, the *Conseil* refrained from explicitly classifying such a violation as falling under the

¹¹⁴⁹ In this respect see also BLANCHET, “L’usage de la théorie...,” *supra* note 1037, p. 397.

¹¹⁵⁰ SIMON, “La jurisprudence...,” *supra* note 1141, pp. 5 *et seq.*

¹¹⁵¹ *CE, ass.*, 8 février 2007, n°287110, *Sté Arcelor Atlantique et Lorraine et a.*, Juris-Data n°2007-071436.

¹¹⁵² *CE, Gardedieu*, *supra* note 1094.

¹¹⁵³ *CE, ass.*, 11 décembre 2006, n°234560, *Sté De Groot en Slot Allium BV*, Juris-Data n°2006-071448.

¹¹⁵⁴ *Ibid.*

¹¹⁵⁵ *CE, Gardedieu*, *supra* note 1094.

regime of *responsabilité pour/sans faute*.¹¹⁵⁶ And, last but not least, in the *Arcelor* decision,¹¹⁵⁷ delivered on the same day, the *Conseil d'État* elaborated with remarkable precision on the administrative judge's obligations and limits when testing the validity and conformity of an administrative decree or order implementing a Community directive with respect to French constitutional principles.¹¹⁵⁸ According to Simon, all these judgments point to a "*changement d'état d'esprit*" towards Community law in the jurisprudence of the *Conseil d'État*.¹¹⁵⁹

However, could this change in the *Conseil*'s attitude towards EC law not also be interpreted as the immediate result of the recent 'threat' spelled out by the CJEU in the *Köbler* ruling to 'punish' non-compliant courts of last instance with State liability claims? Alternatively, do these three cases truly signal a change of direction in the *Conseil d'État*'s longstanding difficulties in complying with its obligations under European Community law? Despite the "Europe-friendly" signals of the *Conseil d'État* in its most recent jurisprudence, it remains an open question whether these developments will really culminate in the "*grand ralliement à l'Europe des juges*"¹¹⁶⁰ and mark the beginning of a new era in the relationship between the *Conseil d'État* and the EU's Court of Justice. It might as well simply turn out to be a hasty conclusion to predict such a golden age. After all, not all that glitters is gold.

¹¹⁵⁶ See FREDERIC LENICA and JULIEN BOUCHER, "Chronique générale de jurisprudence administrative française: Hiérarchie des normes et contentieux de la responsabilité" (2007) 63 *AJDA* 11, pp. 585 *et seq.* On the French State liability regime in the international and European context: *Rapport du Conseil d'État 2005: Responsabilité...*, *supra* note 930, pp. 287 *et seq.*

¹¹⁵⁷ *CE, Arcelor*, *supra* note 1151.

¹¹⁵⁸ For a detailed discussion of the case see FREDERIC LENICA and JULIEN BOUCHER, "Chronique générale de jurisprudence administrative française: Le juge administratif et le statut constitutionnel du droit communautaire dérivé" (2007) 63 *AJDA* 11, pp. 577 *et seq.*

¹¹⁵⁹ SIMON, "La jurisprudence...", *supra* note 1141, p. 5.

¹¹⁶⁰ *Ibid.*

III. Graphic overview of Group III

Restriction of State liability for judicial breaches to cases of...	AUSTRIA	DENMARK	FINLAND¹¹⁶¹	FRANCE¹¹⁶²	GERMANY¹¹⁶³	HUNGARY¹¹⁶⁴	ITALY¹¹⁶⁵	PORTUGAL	SPAIN	SWEDEN¹¹⁶⁶	SUBJECTIVE elements of fault
...INTENTIONAL harm/ deliberate infringements			✓		✓		✓ 1167		✓	✓	
...GRAVE FAULT /untenable fault			✓	✓	✓	✓ 1168	✓ 1169		✓	✓	
...DENIAL OF JUSTICE/ perversion of the course of justice				✓	✓ 1170		✓ 1171				
...FAULT exceeding reasonable standards		✓	✓						✓	✓ 1172	
GROSS NEGLIGENCE /inexcusable negligence										✓	
...SIMPLE NEGLIGENCE											
OBJECTIVE STANDARD of fault	✓ 1173				✓ 1174			✓ 1175			

¹¹⁶¹ See also ‘Act on Compensation from State Funds for the Arrest or Detention of an Innocent Person (Act No. 422/1974)’.

¹¹⁶² Applicable to acts by the *Justice Judiciaire*; for judicial acts by the *justice administrative* only “[i]f the serious fault results from the content of the judgment itself.”

¹¹⁶³ The restrictions in this case only apply with reference to judicial acts *stricto sensu*. In fact, ministerial acts by the judiciary fall under group IV.

¹¹⁶⁴ Protection of procedural guarantees as in Article 6 ECHR by the Act on Petty Offences (Act LXIX of 1999).

¹¹⁶⁵ Law of 13 April 1988 no. 117 on the ‘compensation for losses caused by the exercise of judicial functions and the civil liability of judges’.

¹¹⁶⁶ For all ordinary courts (except the Supreme Courts as discussed under group II).

¹¹⁶⁷ Article 2(1) Law No 117/1988.

¹¹⁶⁸ See p. 272 of this chapter.

¹¹⁶⁹ Article 2(3) Law No 117/1988: “*colpa grave*”.

¹¹⁷⁰ „...*pflichtwidrige Verweigerung oder Verzögerung der Ausübung des Amtes*.”

¹¹⁷¹ Article 3 Law No 117/1988. See GRAZIADEI and MATTEI, “Judicial Responsibility...,” *supra* note 829, p. 107.

¹¹⁷² The amount of compensation can be reduced in case of contributory negligence by the applicant. In this case negligence has been defined as ‘manifestly incorrect assessments of law and fact’.

¹¹⁷³ MEIER, “Prozeßkosten...,” *supra* note 642, p. 626.

¹¹⁷⁴ See SCHOISWOHL, *Staatshaftung*, *supra* note 651, pp. 188 *et seq.*, who speaks about the development of Article 34 in conjunction with Article 839 *BGB* towards a fault-based liability scheme guided by objective criteria. (“*Das Verschuldenskriterium wurde von der Rechtsprechung im Laufe der Zeit entindividualisiert und objektiviert.*”)

¹¹⁷⁵ Recent reform of the State liability framework. See Law n°67/2007 of 31 December 2007.

CHAPTER VI.
**PROCEDURAL OBSTACLES TO A COMPREHENSIVE
RECOGNITION OF THE PRINCIPLE OF STATE LIABILITY FOR
JUDICIAL BREACHES
(GROUP IV)**

In the last group of our classification, we will turn our focus to those countries featuring procedural obstacles to the invocation of State liability for judicial breaches *stricto sensu*. While Member States pertaining to this last category recognize a general principle of State liability for judicial breaches under national law, the concept is nevertheless heavily restricted by different procedural barriers, whose purpose is in most cases to protect the principle of *res judicata*. We find such national procedural restrictions to claims *à la Köbler* for example in countries like Finland, Belgium, the Czech Republic, and Luxembourg.

Furthermore, a number of Member States whose State liability systems we have already discussed in the context of one of our first three groups also feature other restrictions under national law, which additionally qualify them for group IV. A widespread procedural pre-requisite under national law is the rule of primary use of the national appellate procedure, to which a State liability claim would merely qualify as secondary proceedings. Like in the previous chapters we will classify all the Member States recognizing this rule and present them in a corresponding graph.¹¹⁷⁶ Member States in possession of such ‘double-membership’ are, *inter alia*, Germany, Slovakia and Bulgaria. Nevertheless, our attention in this chapter will first be on those Member States pertaining only to group IV. One of those countries, which also serves as our prototype for this last group, is Belgium.

¹¹⁷⁶ See pp. 408 *et seq.*

The Case of BELGIUM

I. The Concept of State Liability for Judicial Breaches in Belgium

It is interesting to note that the Kingdom of Belgium is the only Member State which has acknowledged, in its case-law, the general principle of the liability of the State for the actions of its courts.¹¹⁷⁷

1. *Tour d'Horizon* of the general framework of public liability under Belgian law

In Belgium the reparation of damage caused by the State in the exercise of official duties is broadly covered by two different concepts: *la responsabilité civile* on the one hand and the system of *le contentieux de l'indemnité* on the other.¹¹⁷⁸

a) *La responsabilité civile*

The famous case of *Flandria*¹¹⁷⁹ constituted the point of departure for an evolving jurisprudence with respect to the regime of civil liability for damages caused by public authorities in Belgium.¹¹⁸⁰ As early as 1920 the *Cour de Cassation* declared that on the basis of Article 144 (former Article 92) of the Belgian Constitution, public authorities, when acting in their official capacity, were not immune from tort actions brought by individuals whose rights had been infringed. In fact, the *Flandria* ruling created two essential rules of thumb concerning the basic framework of State liability in Belgium. Firstly, it was stipulated that the Constitution awarded to ordinary courts

¹¹⁷⁷ Opinion Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 83.

¹¹⁷⁸ MARIANNE DONY, "Le Droit Belge" in G. Vandersanden and M. Dony (eds.), *La responsabilité des Etats membres en cas de violation du droit communautaire: Etudes de droit communautaire et de droit national comparé* (Bruxelles, Bruylant, 1997), pp. 149 *et seq.*

¹¹⁷⁹ *Cour de Cassation, La Flandria*, 5 novembre 1920, *Pas.*, 1920, I, pp. 193 *et seq.*

¹¹⁸⁰ Charlier referred to this form of liability as "*la responsabilité des pouvoirs publics au contentieux subjectif civil*." In PAUL CHARLIER, "La responsabilité des pouvoirs publics en droit belge" (1980) *JT*, p. 146.

and tribunals the exclusive competence to deal with liability claims based on civil law.¹¹⁸¹ As a result, save for specific and clearly codified exceptions, all civil rights were put under the protection of the *justice judiciaire* and classified – no matter what the identity of the parties or what the specific nature of the act causing the violation – solely according to the nature of the law which had been violated. In case a State action violated an individual's right, the ordinary judiciary had the power to declare such acts as being unlawful and thereafter award the victim an acceptable amount of compensation.¹¹⁸² As a consequence, since 1920 the *justice judiciaire* has been regarded as the guarantor of the principle of legality in Belgium.¹¹⁸³

Secondly, the *Flandria* judgment confirmed the basic rule that all questions of liability concerning public authorities were to be solved in accordance with the legal framework provided by civil law and were thus subject to Articles 1382 and 1383 of the Belgian Civil Code.¹¹⁸⁴ In his conclusions preceding the famous *Flandria* judgment, the public prosecutor Paul Leclercq had already insisted on the fact that the liability regime of civil law “*s’applique au gouvernement comme aux particuliers, car comme les particuliers, il doit respecter les droits civils. Comme les particuliers, il est*

¹¹⁸¹ Thereby, the judgment was referring to (former) Article 92 of the Belgian Constitution. Ibid, p. 146.

¹¹⁸² Cass., 5 nov. 1920, *Flandria*, *supra* note 1180, pp. 193 *et seq.*: “[...] les gouvernants ne peuvent rien que ce qu’ils sont chargés de faire et sont comme les gouvernés soumis à la loi; ils sont limités dans leur activité par les lois et notamment celles qui organisent les droits civils et [...] s’ils lèsent l’un de ces droits, le pouvoir judiciaire peut déclarer que leur acte a été accompli sans pouvoir, qu’il est donc illégal et constitutif de faute et accorder la réparation du préjudice ainsi causé.” See also CHARLIER, “La responsabilité...,” *supra* note 1180, p. 148.

¹¹⁸³ JEAN-LUC FAGNART, “De la légalité à l’égalité”, *La Responsabilité des Pouvoirs Publics: Actes du Colloque Interuniversitaire organisé les 14 et 15 Mars 1991 par la Faculté de Droit de l’Université Catholique de Louvain et la Faculté de Droit de l’Université Libre de Bruxelles* (Bruxelles, Bruylant, 1991), pp. 7 *et seq.* Subsequent judgments gradually extended this principle. In this context see, for example, Judgment of 26 April 1963, *Pas.* 1963, I, pp. 906 *et seq.*, where the Court explicitly stated that the public administration is bound by tort law, even in the exercise of its rule-making function, according to Articles 1382 and 1383 of the Civil Code in the same way as individuals and private law entities. See VAN GERVEN *et al.*, *Tort Law*, *supra* note 238, p. 387.

¹¹⁸⁴ Provisions on civil liability in Belgium:

Article 1382 Code Civil: Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.

Article 1383 Code Civil: Each one is liable for the damage which he causes not only by his own act but also by negligence and imprudence.

Article 1384 Code Civil: One is liable not only for the damage which he caused by his own act but also for that which is caused by the act of persons for whom he is responsible, or by things which he has in his keeping.

English translation as in BUSSANI and PALMER, “The liability...,” *supra* note 47, p. xxvii.

soumis à la loi.”¹¹⁸⁵ The *Cour de Cassation* subsequently adhered to Leclercq’s reasoning and found in its final judgment that all State authorities were subject to the law and that all their acts had to be within the limits of the law. In the same ruling, the Court then affirmed that any person who had suffered damage had the right to obtain redress from the ordinary judiciary, even if the damage had been caused by a public authority.¹¹⁸⁶

Contrary to the separate regulation of private and public liability in countries such as France and Austria, Belgium (together with England) belongs to the group of countries which lack a self-standing legal framework of public liability. Instead, under conjoined systems such as that in Belgium, the concept of State liability emanates entirely from the basic framework of civil law liability. In other words, the same legislative grounds not only cover liability claims between individuals, but at the same time also protect

*une personne qui se dit titulaire d’un droit civil allègue qu’une atteinte a été portée à ce droit et qu’elle demande réparation du préjudice [...] même au cas où l’auteur prétendu de la lésion serait l’État, une commune ou quelque autre personne de droit public [...].*¹¹⁸⁷

According to Article 1382 Civil Code, liability in Belgium is generally conditioned on the simultaneous occurrence of the standard three elements, which we traditionally encounter in most national liability regimes. The three requirements are an effective or alleged fault, the occurrence of damage and the existence of a causal link between the alleged fault and the damage caused. In essence, the concepts of liability under private and under public law are built on a common foundation, the

¹¹⁸⁵ *Conclusions du Procureur général Leclercq, Pas.* 1920, I, p. 223.

¹¹⁸⁶ *Cass.*, 5 nov. 1920, *Flandria*, *supra* note 1180, pp. 193 *et seq.* states that anyone who “[...] demande la réparation du préjudice qu’elle a éprouvé, le pouvoir judiciaire peut et doit connaître de la contestation et est qualifié pour ordonner le cas échéant, la réparation du préjudice, même au cas où l’auteur prétendu de la lésion serait l’État [...] ou quelque autre personne de droit public.”

¹¹⁸⁷ *Ibid.* As formulated in Article 1382, the courts have to guarantee protection for any violation of a civil right by a public or a private entity, which then implies the right to be compensated for any damage sustained.

principle of fault.¹¹⁸⁸ Similar to French law, the definition of *fault* in this context embraces any violation of a pre-existing obligation¹¹⁸⁹ or, as formulated by Bocken, “[...] the violation of a written or unwritten rule of conduct in force in a certain society at a certain moment.”¹¹⁹⁰ Such rule of conduct is defined in a broad manner and could in fact constitute a particular obligation contained in a law as well as a general duty of care, such as the duty to behave “*en bon père de famille*”.¹¹⁹¹ Fault can evolve either from the violation of a statutory or a regulatory provision or from negligent behaviour, which marks a departure from the general duty of care. The damage does not necessarily have to result from the violation of a civil right, but can also appear through the infringement of simple interests, which are not protected by a particular judicial act. However, in such cases compensation will only be awarded when these interests are legitimate and constitute an advantage for the beneficiary.¹¹⁹² While running the risk of schematizing and over-simplifying the definition, Andersen broadly defines fault as being “*toute contravention, si légère soit-elle, à la loi, en ce compris le manquement au devoir general de prudence.*”¹¹⁹³

With respect to the element of causality as a requirement in liability proceedings, the Belgian jurisprudence strictly follows the principle of equivalence and its essential maxim of ‘*conditio sine qua non*.’ Last but not least, the damage caused has to be fully repaired. In fact, reparation has to be such as to put the victim in the position he or she was in before the damage occurred. The principle of natural

¹¹⁸⁸ ROBERT ANDERSEN, “Quelques réflexions sur la responsabilité du fait des lois” *Actualité du contrôle juridictionnel des lois, Travaux des sixièmes journées d’études juridiques Jean Dabin* (Bruxelles, Maison F. Larcier, S.A., 1973), p. 394. Andersen defines the notion of fault as “[...] toute contravention, si légère soit-elle, à la loi, en ce compris le manquement au devoir général de prudence.”

¹¹⁸⁹ “[...] tout manquement à une obligation préexistante.” See DONY, “Le Droit Belge,” *supra* note 1178, p. 150.

¹¹⁹⁰ HUBERT BOCKEN, “Tort Law” in H. Bocken and W. De Bondt (eds.), *Introduction to Belgian Law* (Bruxelles/The Hague/London/Boston, Bruylant/Kluwer Law International, 2001), p. 248.

¹¹⁹¹ Referred to as “*l’obligation générale de prudence*”.

¹¹⁹² On the notion of fault see also ANDERSEN, “Quelques réflexions...,” *supra* note 1188, p. 394 and BOCKEN, “Tort Law,” *supra* note 1190, p. 248.

¹¹⁹³ ANDERSEN, “Quelques réflexions...,” *supra* note 1188, p. 394.

restitution has priority over pecuniary compensation (*restitutio in integrum*), but only when natural restitution is still possible and reasonable.¹¹⁹⁴

In Belgium the analogous application of the civil law definition of damage and its corresponding condition of causality (i.e. the principle of equivalence) to the system of liability for acts of public authorities in Belgium has not created any noteworthy difficulties in practice. For the concept of damage, the courts initially considered that only the violation of rights protected under civil law could provide a valid basis for reparation. Over time however, they also recognized public liability claims in case of, for example, the violation of political rights.¹¹⁹⁵ In a judgment of 13 May 1982 the *Cour de Cassation* finally confirmed that in general “*l’État est soumis aux règles qui régissent la réparation des dommages découlant des atteintes portées par des fautes aux droits subjectifs et aux intérêts légitimes des particuliers.*”¹¹⁹⁶

With respect to the question of reparation, the courts at first only saw themselves competent to requiring a public authority to pay a pecuniary form of compensation. However, in 1980 the *Cour de Cassation* decided that public authorities would not escape the rule of *réparation en nature*. From then on, the judge was allowed to impose on the tortfeasor any measures necessary to prevent or repair the damage.¹¹⁹⁷ Contrary to the basic elements of liability, such as damage, reparation and causation, the application of the definition of fault as formulated in *Flandria* and as understood in the context of civil liability, posed numerous difficulties with respect to liability claims based on violations committed by public authorities.¹¹⁹⁸

¹¹⁹⁴ BOCKEN, "Tort Law," *supra* note 1190, p. 264.

¹¹⁹⁵ *Cour de Cassation (1^{re} chambre)*, *Cuvelier c/ la Société nationale du logement*, 16 décembre 1965, *JT*, 1966, pp. 319 *et seq*; the principle was reconfirmed in *Cour de Cassation (1^{re} chambre)*, *Goffin c/ État Belge, Ministre des Communications, Postes, Télégraphes et Téléphones*, 23 avril 1971, *Pas.*, 1971, I, pp. 752-755.

¹¹⁹⁶ *Cour de Cassation (1^{re} chambre)*, *Société anonyme des 'Charbonnages de Gosson-Kessales', en liquidation, c/ Commune de Seraing-sur-Meuse et État belge, Ministre de l'intérieur*, 13 mai 1982, *Pas.*, 1982, I, pp. 1056 *et seq*.

¹¹⁹⁷ *Cour de Cassation (1^{re} chambre)*, *État belge, Ministre de la défense nationale c/ Leclef et Dumoulin*, 26 juin 1980, *Pas.*, 1980, I, pp. 1341-1362.

¹¹⁹⁸ We will elaborate further on this issue in the following paragraphs.

In sum, Belgian law, unlike French law,¹¹⁹⁹ does not subject State liability to a special administrative liability regime. And, unlike German law,¹²⁰⁰ Belgian law does not have special rules in the Civil Code on this question. Belgian law submits liability for the conduct of public bodies to the same rules which apply to the conduct of individuals. In conformity with German law,¹²⁰¹ it confers jurisdiction over tort claims against public bodies to ordinary courts. In this context we can also distinguish between three different case-scenarios depending on which public power is held responsible for causing harm. The three different options, each of which we will discuss in detail, are claims of State liability for harm caused by the administration; harm caused by the legislature and harm caused by the judiciary.¹²⁰²

i) State liability for harm caused by the administrative authorities

Most cases of State liability for damage caused by public authorities can be traced back to a violation committed by the executive organs of the State. At first, the principle of immunity for administrative acts was retained in Belgium in order to safeguard the administration's areas of competence and to avoid any interference with its regulatory remit. Moreover, the judiciary adhered to a stringent interpretation of the principle of separation of powers, which banned the judicial branch from interfering in any way with administrative matters. However, over time the judiciary liberated itself from this reservation and progressively extended its sphere of control.¹²⁰³

The first possibility concerning damage caused by the administrative authorities in Belgium was of a violation of legal obligations. It has always been rather easy to invoke the liability of the administration for the violation of a specific legal obligation. In this case the principle of separation of powers could not withstand the

¹¹⁹⁹ See analysis of the French court structure in Chapter V.

¹²⁰⁰ Article 839 *BGB*.

¹²⁰¹ For procedural issues concerning State liability claims under German law see also JÜRGEN HIDIEN, *Die gemeinschaftsrechtliche Staatshaftung der EU-Mitgliedstaaten* (Baden-Baden, Nomos Verlagsgesellschaft, 1999), p. 73.

¹²⁰² DONY, "Le Droit Belge," *supra* note 1178, p. 152.

¹²⁰³ *Ibid.*

declaration by the courts that the administration had violated its legal obligations and that consequently the authorities were required to repair the damage caused to the victims of the violation. Secondly, there was the case of a violation of the general duty of care, *la violation de l'obligation générale de prudence*,¹²⁰⁴ which the administrative authorities could commit in the absence of a set of clearly defined legal obligations. In this context the jurisprudence differentiated for a long time between *les actes d'exécution* on the one hand, and *les actes de décision* on the other. When a violation connected to an *acte d'exécution* had occurred, regular sanctions could be imposed on the relevant public authority. However, whenever the violation was connected to an *acte de décision*, the act could not be declared unlawful for the simple reason that such acts were considered to fall within the administration's sphere of discretionary power to decide by which means best to achieve its objective.¹²⁰⁵

However, the distinction between the two sets of acts was abandoned in a decision by the *Cour de Cassation* on 7 March 1963, where the Court declared that “*les pouvoirs que la loi attribue à l'administration dans l'intérêt général ne soustraient pas celle-ci au devoir de prudence, qui s'impose à tous.*”¹²⁰⁶ As a consequence, the administration from then on had to respect not only all the normative requirements and legal regulations, but also the general duty of care (*l'obligation générale de prudence*) in all of its acts, be it *actes d'exécution* or *actes de décision*. The universality of this principle was reconfirmed in a subsequent judgment of 26 April 1963, which expressly stated that

*aucune disposition constitutionnelle ou légale ne soustrait le pouvoir exécutif dans l'exercice de ses missions et de ses activités réglementaires à l'obligation découlant des articles 1382 and 1383 du code civil de réparer le dommage qu'il cause à autrui par sa faute, notamment par son imprudence ou sa négligence.*¹²⁰⁷

¹²⁰⁴ To be loosely translated as ‘the violation of the generally required level of diligence’.

¹²⁰⁵ J. DABIN and A. LAGASSE, “Examen de jurisprudence – La responsabilité délictuelle et quasi-délictuelle” *RCJB*, 1959, n°95.

¹²⁰⁶ *RCJB*, 1963, p. 63, note J. Dabin.

¹²⁰⁷ *RCJB*, 1963, p. 116.

Finally, ever since the *Cour de Cassation*'s ruling of 11 April 1969 both acts and omissions by administrative authorities were subject to judicial control.¹²⁰⁸ That judgment stipulated that in order to fulfil its duty of care, the administration was bound to take particular measures. In other words, if certain measures were not properly implemented or not implemented at all, the administration had committed a violation and consequently had to repair the resulting damage caused to the individual. Finally, the *Cour de Cassation* considered that the absence of administrative regulations necessary to ensure the execution of a particular law could also amount to fault even when the law did not set up a timeframe within which the regulations should have been implemented.¹²⁰⁹ Apart from cases when it had been impossible for the administrative authorities to fulfil their regulatory duty, they had to ensure the execution of a law within a reasonable amount of time.¹²¹⁰ In sum, the State liability regime for administrative breaches in Belgium was fully embraced by the conditions set out in Articles 1382 *et seq.* of the Civil Code or, as formulated in the Court's decision "*qu'au niveau des principes, aucun fait positif ou négatif imputable à l'administration, (n'échappe) sous aucun aspect à l'application des articles 1382 et suivants du code civil.*"¹²¹¹

As we have already indicated in the previous paragraphs, while the analogous application to State liability claims of the basic elements of liability as used under the civil law regime did not cause any notable problems, the requirement of fault as a prerequisite for any liability claim also against the State initially still lacked clearly-defined parameters. The question of whether a simple violation of a legal provision was sufficient to amount to fault had long been discussed in the jurisprudence and the literature and had remained a point of contention. One side argued that not every simple legal violation resulted in fault and that an illicit act would only qualify as fault in the case where a reliable and proper public servant under the exact same circumstances would not have committed the same violation. The other side sustained

¹²⁰⁸ *Cour de Cassation*, 11 avril 1969, *Pas.*, 1969, I, p. 702. See also CHARLIER, "La responsabilité...", *supra* note 1180, p. 149.

¹²⁰⁹ *Cass. (1^{re} ch.)*, 23 avril 1971, *supra* note 1194, pp. 753-755.

¹²¹⁰ *Civ. Brux.*, 16 juin 1976, *Adm. Publ. Mens.* 1976, p. 23.

¹²¹¹ CHARLIER, "La responsabilité...", *supra* note 1180, p. 145.

the very idea that without giving any further thought and consideration to the question of whether there was negligence or imprudence involved, every legal violation was to be equated with the notion of fault.¹²¹²

The *Cour de Cassation* eventually addressed this thorny issue in two consecutive judgments. First, in a ruling of 19 December 1980, the Court elucidated its own particular definition of fault proclaiming that,

*le pouvoir exécutif agit fautivement lorsqu'il excède les limites de son pouvoir réglementaire et que la seule constatation que tout fonctionnaire placé dans la même situation aurait donné la même interprétation erronée que celle du fonctionnaire en cause n'exonère pas l'administration de sa responsabilité pour l'excès de pouvoir qu'elle a commis.*¹²¹³

In a nutshell, to the astonishment and consternation of those scholars who had suggested a qualified definition of fault, the Court found in favour of a broad and all-embracing understanding of the concept of fault. In a later judgment the *Cour de Cassation* further elaborated on this question stating that in the absence of a cause of justification, the annulment of an administrative act by the *Conseil d'État* would, *ipso facto*, prove the authority's fault and could then give rise to liability.¹²¹⁴ In other words, an annulment of an administrative act by the *Conseil d'Etat* automatically confirms the occurrence of fault and therefore renders it easier for the claimant to

¹²¹² J. Velu in his conclusions in the case *Cass. (1^{re} ch.)*, 13 mai 1982, *supra* note 1196, p. 772.

¹²¹³ *Pas.*, 1981, I, p. 453.

¹²¹⁴ *Cour de Cassation (1^{re} chambre)*, *Société anonyme des charbonnages de Gosson-Kessales, en liquidation, c/ Commune de Seraing-sur-Meuse et État belge, Ministre de l'intérieur*, 13 mai 1982, *Pas.* 1982, I, p. 1086: "[S]ous réserve de l'existence d'une erreur invincible ou d'une autre cause d'exonération de responsabilité, l'autorité administrative commet une faute lorsqu'elle prend ou approuve un règlement qui méconnaît des règles constitutionnelles ou légales lui imposant de s'abstenir ou d'agir de manière déterminée [...]." Furthermore, the Court also ruled in the same case (p. 1086) that "[L]orsqu'une juridiction judiciaire est valablement saisie d'une demande en responsabilité fondée sur l'excès de pouvoir résultant de la méconnaissance de telles règles constitutionnelles ou légales ayant entraîné l'annulation d'un acte administratif par le Conseil d'État, la constatation par ce dernier de l'excès de pouvoir s'impose à elle; que, dès lors, sous la réserve indiquée ci-avant, cette juridiction doit nécessairement décider que l'autorité administrative, auteur de l'acte annulé, a commis une faute [...]."

lodge a liability claim against the State.¹²¹⁵ It is, however, not a requirement to obtain the prior annulment of the administrative act concerned in order for the individual to bring a liability claim. In fact, an individual merely has to bring a liability claim for the harm suffered as a result of an illegal public act. It is the competent court in each case which then has to verify if the administrative authority violated its legal obligations or not. This could be the case even where the administration has large discretionary powers.¹²¹⁶

ii) An extended regime of responsabilité sans faute?

In addition to the principle of State liability based on fault, the *juridictions judiciaires* had early on established a compensatory framework in the context of public works and disputes between proprietors based on the idea of *responsabilité sans faute*.¹²¹⁷ Initially, the *Cour de Cassation* had created the rule that when a property owner disturbed the equilibrium of rights existing between neighbouring proprietors through an act committed without fault and thereby imposed a heavier burden than usually acceptable on one of his or her neighbours, he or she had to compensate the troubled neighbour. While the overall principle was extracted from Article 11 of the Belgian Constitution, the *Cour de Cassation* traditionally based its jurisprudence in such cases on Article 544 of the Civil Code. Over time, the question emerged in this context whether the theory of equality of rights between proprietors had to be confined to disputes concerning the law of property or whether its application could in fact be extended to damages incurred by public authorities to other subjective rights outside this area.¹²¹⁸

¹²¹⁵ A. VANWELKEN-HUYZEN, "L'autorité de chose jugée des arrêts du Conseil d'État en matière de responsabilité de la puissance publique", *note sous Cass.*, 7 novembre 1975, *RCJB*, 1977, p. 437.

¹²¹⁶ *Cour de Cassation*, 7 novembre 1975, *RCJB*, 1977, pp. 417-445.

¹²¹⁷ See *Cass.*, 6 avril 1910 (*deux arrêts*), *Pas.*, 1910, I, p. 915 *et concl. de M. l'avocat général Mahaux*. See, *inter alia*, JEROME SOHIER, "Responsabilité sans faute du pouvoir judiciaire", *La Responsabilité des Pouvoirs Publics: Actes du Colloque Interuniversitaire organisé les 14 et 15 Mars 1991 par la Faculté de Droit de l'Université Catholique de Louvain et la Faculté de Droit de l'Université Libre de Bruxelles* (Brussels, Bruylant, 1991), pp. 383 *et seq.*

¹²¹⁸ As already indicated by Advocate General Mahaux in his Opinion in the cases of *Cass.*, 6 avril 1910, *supra* note 1217, p. 915.

The question first arose in 1970 in the *Van Deeren* case. This case, which concerned a State liability claim based on an individual's unjustified detention on remand, occurred three years before the enactment of a special law regulating instances of unjustified detention on remand.¹²¹⁹ In this case the parents of the victim had sued the State, *inter alia*, for a violation of the equilibrium of rights existing between the individual and the society, as well as for breach of the principle of equality before public burdens.¹²²⁰ The first instance court argued in its ruling that State liability for a violation of the equilibrium of rights between the individual and the society could not be invoked in connection with a public breach of a fundamental right committed without fault. This was especially true in an area where the general interest weighed heavier than the personal interest of the individual. Moreover, according to the judgment, the principle of equality of citizens before public burdens would only be applicable to cases related to the general functioning of public services, excluding those public services which sought to protect collective interests at times even over and above the interest of the individual.¹²²¹

On 11 June 1974 this judgment was confirmed by a decision of the *Cour d'Appel* of Brussels.¹²²² Using a different argument, the Court underlined the fact that a judge could not apply a general principle of law unless it was in conformity with the will of the legislature. In this particular case the Law of 13 March 1973, on compensation for unjustified detention on remand, which had been enacted in the meantime, explicitly specified that compensation could only be awarded in cases that had occurred after the entry into force of this particular law. Accordingly, the Court inferred that the legislature had in fact never intended to compensate the victims of unjustified detention on remand in instances that took place before the entry into force of the law in 1973.¹²²³

¹²¹⁹ In its Article 28 the law of 13 March 1973 introduced a regime of State liability *sans faute* for particular cases of unjustified detention on remand. In this context see SOHIER, "Responsabilité sans faute...", *supra* note 1218, pp. 385 *et seq.*

¹²²⁰ *Avis du premier substitut du procureur du Roi O. Van De Meulebroeke, avant Civ. Bruxelles*, 1^{er} septembre 1910, R.W., 1910-71, col. 257.

¹²²¹ *Ibid.* For more details on the factual circumstances of the case see the text of the judgment.

¹²²² *Bruxelles*, 11 juin 1974, R.W., 1975-1976, col. 1099.

¹²²³ *Ibid.*

In the *Luxora* case, in which a judicial organ had prematurely announced the insolvency of a company, the company's subsequent liability claim was based on the fault committed by the judges in the exercise of their non-judicial functions. Moreover, the claimants also sued the State for an alleged violation of the principle of equality before public burdens, underlining the exceptional damage which had occurred to Luxora as a result. The *Cour d'Appel de Bruxelles*, however, turned down the claim and refrained from awarding compensation.¹²²⁴ Subsequently, the *Cour de Cassation* also rejected the appeal against this decision by virtue of the fact that a rule of law or an erroneous application of such law could in itself never constitute a violation of the principle of equality before public burdens.¹²²⁵ This reasoning was certainly surprising in light of the fact that an unjustified declaration of insolvency *ex officio*, which lay within the ambit of application of the insolvency law, clearly violated the equality of traders in front of public burdens and consequently caused harm to the company.¹²²⁶

Despite the hesitation in the jurisprudence, the proposition that the principle of equality had to be extended beyond the right to property to other subjective rights was, to a certain extent, echoed in the doctrine. In particular those authors, who were worried about the cases of unjustified detention on remand that had occurred before 1973, found it unacceptable that such fundamental rights enjoyed less protection than property rights. After all, neither the *Cour d'Appel* of Brussels in its key decisions of 1974 and 1985, nor the *Cour de Cassation* in its ruling of 1988 had formally rejected the application of the general principle of equality before public burdens in this context. However, both courts refused to apply the principle in practice using different grounds of justification. In the *Van Deeren* case, according to the competent court, the principle's application failed in light of the fact that it would have been contrary to the

¹²²⁴ *Bruxelles*, 31 octobre 1985, *RGAR*, 1987, n°11221: "... une personne ne subit pas un préjudice exceptionnel lorsque le dommage allégué s'identifie aux inconvénients qui sont la conséquence normale des règles communes à tous ceux qui ont la qualité de commerçants ; que toute personne physique ou morale qui exerce le commerce s'expose à se voir appliquer la loi sur les faillites ; ... que les appelants n'établissent pas qu'ils ont fait l'objet de mesures différentes de celles qui atteignent les citoyens se trouvant dans la même situation."

¹²²⁵ *Cass.*, 17 novembre 1988, *Pas.*, 1989, I, p. 289.

¹²²⁶ SOHIER, "Responsabilité sans faute...", *supra* note 1218, pp. 390 *et seq.*

will of the legislature to award compensation in instances that had occurred before the enactment of the Law of 13 March 1973; in the *Luxora* judgment, the concept's application was hindered by the failure to fulfil the indispensable prerequisite of the occurrence of an exceptional damage that had resulted from the violation incurred by the public power.

b) *Le contentieux de l'indemnité*

Whenever the principle of equality before public burdens has undeniably been violated to an individual's detriment, the victim has had several possibilities under Belgian law to seek compensation for such exceptional and serious harm. Out of the compensatory regimes which explicitly refer to the concept of public liability *sans faute*, one form developed, as we have just seen, from the cases of neighbouring property disputes. In addition to that, there is a separate compensatory mechanism before the *Conseil d'État*, as well as a number of special legislative provisions, through which the State has established remedial schemes for victims of certain judicial errors.¹²²⁷

Nobody would contest the fact that an individual who has been put in detention on remand, but who is finally acquitted by a judgment in his/her favour, has suffered considerable harm through the temporary deprivation of liberty. In the same manner, a company, which was by mistake officially declared bankrupt by a court decision that was later revised on appeal, suffered irreparable damage because of this judicial malfunction. In both cases, it is not obvious whether the State organ had committed the act with fault.¹²²⁸ In fact, the point common to the previous two examples is that at the time of decision nothing appeared to be patently wrong with the act which was at the origin of the damage. This should, however, not divert from the fact that certain individuals or certain groups of individuals frequently suffer much more from such acts of public malfunctioning than others. Today, the increasing regulatory intervention of public authorities in everyday life brings a growing risk that they will

¹²²⁷ Ibid, pp. 384 *et seq.* All these cases will be examined in detail in the following section.

¹²²⁸ Ibid, pp. 383 *et seq.*

cause damage, which often occurs even if the State cannot be charged with an illegal decision or faulty act.¹²²⁹ Similar to the development in neighbouring EU Member States, in Belgium the recognition of a mechanism of responsibility *sans faute* was also therefore indispensable. And it was in this context that the general principle of equality before public burdens, *l'égalité des citoyens devant les charges publiques*, was introduced under Belgian law.

Meanwhile, a complementary system of compensation for exceptional damage had been established in Belgium by the *Loi du 23 décembre 1946*. This system was grounded on the general maxim of equality before public burdens, a concept which we have already encountered under French law.¹²³⁰ One of the objectives behind the creation of the *Conseil d'État* in the Law of 23 December 1946 was to set up a complementary system of State liability that would allow for the compensation for the damage that could not be invoked in front of the ordinary courts and tribunals.¹²³¹ Thereby, the legislature notably considered all cases where harm had been caused by regular administrative acts, for which no fault could be identified, and which did not presuppose the violation of a particular subjective right. Under these premises the legislature introduced the concept of liability *sans faute* for administrative acts in Belgium.¹²³² The *contentieux de l'indemnité* allowed the *Conseil d'État* to award compensation to the victims of specific and exceptional damage on the basis of the general principle of '*rupture de l'égalité devant les charges publiques*'.¹²³³ Notwithstanding the fact that there was no requirement of fault on the part of the relevant authorities, the compensatory mechanism of *le contentieux de l'indemnité* still remained tied to several conditions.

Firstly, the competence of the *Conseil d'État* was *residual* in this context, which implied that the *Conseil* could only rule in those instances where no other court was

¹²²⁹ Ibid, pp. 383 *et seq.*

¹²³⁰ Ibid, p. 391.

¹²³¹ The Law was later modified in 1971.

¹²³² In this context see CHARLIER, "La responsabilité...", *supra* note 1180, p. 146. ANDERSEN, "Quelques réflexions...", *supra* note 1188, pp. 398 *et seq.*

¹²³³ DONY, "Le Droit Belge," *supra* note 1178, p. 161.

competent to do so.¹²³⁴ As is evident from the wording of this rule, the legislature expressed its intention to award the ordinary courts the general competence to deal with cases of State liability for acts of public authorities. As we have previously seen, the *justice judiciaire* is competent each time harm has been caused by a public authority that violates a subjective right or a legitimate interest. Therefore, the field of competence of the *Conseil d'État* essentially only concerned those instances where no fault had been committed, but a violation of a subjective right or legitimate interest had nevertheless occurred.¹²³⁵ In a judgment of 16 December 1992, the *Conseil d'État* accentuated in detail – and in accordance with the predominant opinion in the doctrine¹²³⁶ – the terms of its residual jurisdiction.¹²³⁷ Therein, the *Conseil* declared that it did not have to interpret the requisite of absence of another competent jurisdiction in an abstract manner, but that it was competent to rule in all cases where other courts had dismissed a liability claim either for lack of competence or for lack of legal grounds.¹²³⁸

By leaving the general competence to decide in liability cases to the *pouvoir judiciaire*, the legislature had tried to prevent competition for competence between the *juge judiciaire* and the *juge administratif*. As a result, in Belgium the *Conseil d'État* is competent to decide upon the compensation to be awarded to an individual, whose

¹²³⁴ Article 11 *des lois sur le Conseil d'État, coordonnées le 12 janvier 1973* (M.B., 21/03/1973, p. 3461): “Dans le cas où il n'existe pas d'autre juridiction compétente, la section d'administration se prononce en équité par voie d'arrêt, en tenant compte de toutes les circonstances d'intérêt public et privé, sur les demandes d'indemnité relatives à la réparation d'un dommage exceptionnel moral ou matériel, causé par une autorité administrative.” Until 1971 the *Conseil d'État* only had a consultative function in this area. The administrative judge formulated an opinion (*avis*), which was not binding for the authority eventually taking the decision on the matter. The fact that the *Conseil d'État* only had the function of a *justice retenue* raised preoccupations mainly based on the fact that the administration had the last word in these matters. However, in the *Conseil d'État*'s first years of operation not a single opinion favourable to the applicant's cause was rejected by the administration. See M. LEROY, “Le contentieux de l'indemnité avant et après la loi du 3 juin 1971”, *RJDA*, 1974, p. 233.

¹²³⁵ DONY, “Le Droit Belge,” *supra* note 1178, pp. 161 *et seq.*

¹²³⁶ CH. HUBERLANT, “Essai de délimitation du Conseil d'État avec celles des cours et tribunaux au contentieux de l'indemnité”, *Miscellanea Ganshof van der Meersch*, T. II, Bruxelles, 1972, p. 509; P. LEWALLE, “La réparation du dommage exceptionnel par le Conseil d'État: mythe ou réalité”, *Ann. Fac. Dr. Liège*, 1980, p. 195; CHARLIER, “La responsabilité...”, *supra* note 1180, p. 381.

¹²³⁷ *JT* 1993, p. 333, *avec note de Sohier*.

¹²³⁸ The *Conseil d'État* confirmed its competence “dans les cas où toute autre juridiction doit rejeter la demande soit parce que celle-ci n'est pas de sa compétence, soit parce qu'elle est non fondée”, in *JT*, 1993, p. 333; see also *observations* Sohier, pp. 334 *et seq.*

right to equality before public burdens has been harmed by a legal act, whereas the *juge judiciaire* is competent to find the State responsible on the basis of fault. Over and above that, the *Conseil d'État* is also incompetent to decide in cases where the harm consists of damage committed with fault to a civil or political right, or in case of a conflict outside the usual sphere of property disputes. Nevertheless, the *Conseil* cannot claim competence whenever compensation for damage has been regulated in a specific legal text preserving the competence of the *justice judiciaire* or of other administrative courts. As a result, in the area of *contentieux de l'indemnité* the delimitation between the respective competences of the ordinary versus the administrative judge is not always evident and at times even appears to be fluid and artificial.¹²³⁹ With respect to the topic of our thesis, under the condition that no *tribunal* and no administrative court is competent to compensate the victims of a judicial act, the aforementioned distribution of competences among the various judicial branches will rarely pose any difficulties. Besides that, with reference to the judicial power, special rules have only been established for the question of compensation concerning arbitrary detention on remand. In addition to being residual, the competence of the *Conseil d'État* was also *subsidiary*. This implied that recourse to the *Conseil d'État* could only be held if it had been preceded by a request to the public authority responsible for the damage and that the authority concerned had refused the request or had failed to respond within sixty days.¹²⁴⁰

Meanwhile, the third requirement, which was linked to the question of attribution, was also substantiated at different stages. In fact, the expression of '*autorité administrative*' had only been introduced in this context with the Law of 3 June 1971. In its original version, Article 7 of the Law of 23 December 1946¹²⁴¹ stipulated that the damage must have been caused by the State, the province and/or the commune.¹²⁴² The State was therefore seen as a moral person, who was charged with

¹²³⁹ ANDERSEN, "Quelques réflexions...", *supra* note 1188, p. 420.

¹²⁴⁰ SOHIER, "Responsabilité sans faute...", *supra* note 1218, pp. 392 *et seq.*

¹²⁴¹ *Loi du 23 décembre 1946.*

¹²⁴² Article 7 § 1 alinéa 1 de la loi du 23 décembre 1946: "La section d'administration connaît, dans les cas où il n'existe pas d'autre juridiction compétente, des demandes d'indemnité relatives à la réparation d'un dommage exceptionnel résultant d'une mesure prise ou ordonnée par l'État, la province, la commune ou le gouvernement de la colonie, soit que l'exécution en ait été normale, soit

the exercise of sovereign power over a predetermined territory and whose powers were reified in the executive, the judiciary as well as the legislature. This broad reading had enabled the *Conseil d'État* to extend its competence even to cases where the perpetrator happened to be the legislature. However, all of this was on the condition that the legislature had not itself deliberately excluded or restricted compensation for harm and that the compensatory mechanism as such would not obstruct the efficacy of the law.¹²⁴³ While the Law of 3 June 1971 had intrinsically intended to enlarge the competence of the *Conseil d'État* to include damages caused by public companies or other quasi-State entities, in practice the new law actually yielded the opposite result. Due to the textual reformulation, which consisted in replacing the words of '*État, province, commune*' with the simple expression of '*autorité administrative*', the newly formulated Article 7 of the Law of 3 June 1971 was subsequently interpreted as limiting the *Conseil's* competence to merely those cases where damage had been caused by the executive branch.¹²⁴⁴

Furthermore, similar to French law, the compensatory mechanism of *le contentieux de l'indemnité* required the damage to be of a special degree in terms of its nature and its importance. In other words, the damage had to extend beyond the sacrifices of societal life. The requirement of such '*exceptional damage*' in this context is an indispensable prerequisite we therefore find not only under Belgian, but also under French law. Thereby, specific attributes delineate its ambit of interpretation in both countries and narrow its definition to damage, which can be material or moral, but which has to be existing, actual and certain. Moreover, the damage cannot be reasonably foreseeable and harm has to have been caused directly by an

qu'elle ait été défectueuse ou différée. La section d'administration se prononce en équité par voie d'avis motivé, en tenant compte de toutes les circonstances d'intérêt public et privé." (emphasis added).

¹²⁴³ In this context see JEAN-NICOLAS PARDON and R. O. DALCQ, "La responsabilité des États Membres envers les particuliers en cas de manquements au droit communautaire" (1996) pp. 193 *Journal des Tribunaux, Droit Européen* 33, p. 201 as well as DONY, "Le Droit Belge," *supra* note 1178, p. 162.

¹²⁴⁴ *Article 7bis de la loi du 3 juin 1971*: "Dans le cas où il n'existe pas d'autre juridiction compétente, la section d'administration se prononce en équité par voie d'arrêt, en tenant compte de toutes les circonstances d'intérêt public et privé, sur les demandes d'indemnité relatives à la réparation d'un dommage exceptionnel, moral ou matériel, causé par une autorité administrative." (emphasis added); We will return to the implications of the Law of 3 June 1971 in the context of State liability claims for legislative and judicial breaches in Belgium.

administrative act. Finally, in light of a violation of the principle of equality before public burdens, the damage has to have a certain level of gravity and be excessive with respect to its nature.¹²⁴⁵

Last but not least, the *Conseil d'État* possesses discretionary power in its decision making, which allows it to take into account all the aspects of public and private interest. Consequently, the administrative judge has a wide margin of discretion with respect to his or her decision about the level of monetary compensation. What this rule concedes is that the awarded compensation does not necessarily have to be on a par with the harm caused, but is instead assessed with regard to all the circumstances involved in each case.¹²⁴⁶

i) State liability for harm caused by the legislature

For a long time the question of State liability for legislative breaches in Belgium had merely been dealt with on a theoretical, doctrinal level. The exemption of the legislature from liability claims appeared to be an unchallenged legal rule, which seemingly did not need much justification.¹²⁴⁷ Similar to our analysis of French law in chapter V of this thesis,¹²⁴⁸ the irresponsibility of the Belgian State for legislative breaches was a direct consequence of the idea of absolute sovereignty of the law.¹²⁴⁹ It was roughly the same objection which appeared under a less abstract formulation in the writings of those authors cherishing the law as the true expression of the citizens'

¹²⁴⁵ DONY, "Le Droit Belge," *supra* note 1178, p. 163. Also, ANDERSEN, "Quelques réflexions...", *supra* note 1188, pp. 398 *et seq.*

¹²⁴⁶ SOHIER, "Responsabilité sans faute...", *supra* note 1218, p. 395.

¹²⁴⁷ MICHEL LEROY, "Responsabilité des pouvoirs publics du chef de méconnaissance des normes supérieures de droit national par un pouvoir législatif", *La Responsabilité des Pouvoirs Publics: Actes Du Colloque Interuniversitaire organisé les 14 et 15 Mars 1991 par la Faculté de Droit de l'Université Catholique de Louvain et la Faculté de Droit de l'Université Libre de Bruxelles* (Brussels, Bruylant, 1991), p. 299. On this point see also the Opinion of Advocate General Mathieu Leclercq in the case of 27 June 1845, *Pas.* 1845, I, p. 404 where he underlined the fact that "*appliquer l'article 1382 serait prétendre que la loi peut commettre une faute ou une imprudence [...], que la loi de serait frappée elle-même car l'article 1382 c'est la loi.*"

¹²⁴⁸ See chapter V.

¹²⁴⁹ "*C'est une conséquence nécessaire de l'obligation, qui s'impose à tous, d'exécuter la loi.*" in *Pandectes belges, t. LXXXII, v° Quasi-délit, n°198, col. 731* (1905); LEROY, "Responsabilité des pouvoirs publics...", *supra* note 1247, p. 303.

will. The composition of the Belgian Parliament, which assured the representation of all different interests, guaranteed for the respect of those laws.¹²⁵⁰ Until the early 1980s the primary legislation in Belgium was entirely exempt from judicial review proceedings or from any other form of judicial control.¹²⁵¹ The law simply enjoyed an incontestable status under Belgian law. In support of the reasoning at the time, Morange alleged that a simple compensatory claim for damage incurred by a legal provision would, *ipso facto*, challenge the authority of the legislative power. This would be the case even if the judicial reasoning justifying such compensation did not presuppose fault-based behaviour by the legislature.¹²⁵²

In practice, the judiciary initially simply refused to apply Article 1382 of the Civil Code to cases where the damage was directly linked to a legislative act. The only area where national law was no longer covered by its veil of immunity and where the element of fault was easily attributed to legislative acts was the field of international law.¹²⁵³ Yet, in a judgment of 5 June 1985, for example, the *Tribunal Civil* of Brussels had still declared inadmissible a claim of liability for the State's failure to adjust a specific national law to the requirements of the European Convention on Human Rights. The Court still justified its decision on the grounds that it was not in the judge's competence to control and to rule on acts of the legislature and that it was for the electorate to judge the work of Parliament.¹²⁵⁴

¹²⁵⁰ ANDERSEN, "Quelques réflexions...", *supra* note 1188, p. 392.

¹²⁵¹ This exemption had been based on (former) Article 107 of the Belgian Constitution.

¹²⁵² G. MORANGE, "L'irresponsabilité de l'Etat législateur (Evolution et avenir)", Dalloz, 1962, *Chronique XXVII*, pp. 166.

¹²⁵³ In a ruling of 27 May 1971 the *Cour de Cassation* explicitly confirmed the supremacy of international law over national legal provisions. (Cass., 27 mai 1971, Pas., I, p. 886). ANDERSEN, "Quelques réflexions...", *supra* note 1188, p. 396; JEAN MASQUELIN, "La conformité des lois au droits international et européen" *Actualité du contrôle juridictionnel des lois, Travaux des sixièmes journées d'études juridiques Jean Dabin* (Bruxelles, Maison F. Larcier, 1973), pp. 365 *et seq.*

¹²⁵⁴ Even though in this case the legislature had clearly failed to adhere to the standards of the European Convention of Human Rights. *Civ. Brux.*, 5 juin 1985, *Pas.*, 1985, III, p. 71: "[...] qu'il n'appartient pas au juge de contrôler le pouvoir législatif et de se prononcer sur la conduite du législateur, qui aurait été prudent ou imprudent, négligent ou attentif; que le parlement ne doit répondre de son travail législatif que devant le corps électoral." In this context see also case *Civ. Liège*, 16 février 1993, *JJMB*, 1993, p. 929.

As mentioned before, from 1948 to 1971 the *Conseil d'État* had been acting under limited jurisdiction on claims for State liability in cases of damage caused by legislative authorities. Thereby, the *Conseil* acted on the basis of the principle of equality before public burdens as defined in Article 7(1) of the *Loi du 23 décembre 1946*, which concerned “[...] *demandes d’indemnité relatives à la réparation d’un dommage exceptionnel résultant d’une mesure prise ou ordonnée par l’État, la province, le commune ou le gouvernement de la colonie [...]*.”¹²⁵⁵ However, the jurisprudence was rather hesitant with respect to the question of how much importance should be awarded to this provision in instances when the source of the alleged harm consisted of a national law. At first, the *Conseil d'État* declared that it was only competent to rule upon questions relating to damage caused by administrative organs. However, this declaration had to be read in its case-specific context at the time as in this particular case the *Conseil* had tried to obviate a claim seeking the State’s liability for a judicial breach.¹²⁵⁶

In 1954 the *Conseil d'État* issued an ambiguous opinion that covertly affirmed the Court’s competence in cases where damage had occurred as a result of a legislative provision. The *Conseil d'État* stated therein that it was competent to rule in such instances due to the fact that the damage did not stem directly from the law, but instead from an administrative act executing the law.¹²⁵⁷ This judgment was heavily criticised by De Visscher, who argued in his observations on the case that it had artificially moved the cause of damage from being the law to the cause being an act of execution of the law. This was so even where the administration had applied the law in a correct manner.¹²⁵⁸ Finally, after a few dissatisfying attempts, the *Conseil* elucidated its own particular understanding of the limits of its jurisdiction and eventually arrived at the conclusion that the definition of the State as such embraced

¹²⁵⁵ Article 7(1) *Loi du 23 déc. 1946*.

¹²⁵⁶ “[...] *que si l’État a agi par ses organes administratifs dans l’exercice du pouvoir exécutif*” in *Conseil d’État, avis n°1619, 6 juin 1952*, Mertens.

¹²⁵⁷ CE, *avis n°3385, 13 mai 1954, Leynen, RJDA*, p. 209, *observations P. De Visscher*.

¹²⁵⁸ *Ibid.*

the entirety of the sovereign authority exercised over a predefined territory, including the legislative power.¹²⁵⁹

Nevertheless, the competence of the *Conseil d'État* with respect to compensatory claims remained residual. Generally speaking, the *Conseil*'s jurisdiction involved cases of claims for compensation in relation to which ordinary judges were powerless. Considering the fact that the ordinary judges had pro-actively widened the area of *responsabilité aquilienne*, that is fault-based liability for wrongful damage done to property by an administrative act, the *Conseil d'État*'s field of competence in this context had been reduced to a few cases. Whenever the harm emanated from an administrative act, the *justice judiciaire* was competent to deal with cases involving fault-based acts. If, on the other hand, damage originated from a legislative act, the competence of the *Conseil d'État* was not necessarily subject to similar restrictions concerning the question of fault. As the *justice judiciaire* initially refused to rule on such cases, the *Conseil d'État* finally proclaimed in the *Nuyten et Flamey* judgment of 21 May 1969 that it was competent to deal with liability claims based on damage, which resulted directly from a legislative act.¹²⁶⁰ As mentioned before, in this case the *Conseil d'État* had defined the notion of 'État' in an all-embracing manner as comprising the three branches of the State.¹²⁶¹ Finally, the *Conseil* simply based its competence on the ordinary courts' self-inflicted declaration of incompetence.¹²⁶² Even if in cases where the harm originated from a legislative act, the *Conseil*'s reasoning did not insist upon the occurrence of fault but nor did it exclude such possibility.¹²⁶³ Leaving some of those questions unresolved, the reform of 1971 completely reversed this decision and led once again to drastic changes with

¹²⁵⁹ *Conseil d'État, Nuyten et Flamey c/ État belge, Ministre de la justice, 21 mai 1969, Pas., 1970, II, : "que le terme 'État' vise la personne morale à qui est reconnu l'exercice de l'autorité souveraine sur un territoire déterminé, en ce compris, par définition, le pouvoir législatif."*

¹²⁶⁰ *Ibid.*

¹²⁶¹ See definition in previous section.

¹²⁶² See *CE*, 21 mai 1969, pp. 6-13.

¹²⁶³ LEROY, "Responsabilité des pouvoirs publics...", *supra* note 1247, p. 302.

respect to the judicial competence to rule on compensatory claims for damage caused by the legislature.¹²⁶⁴

As lamented by Leroy,¹²⁶⁵ the newly introduced *Loi du 3 juin 1971* modified the basic dispositions of the compensatory scheme that had been established until then and completely reshuffled the *Conseil*'s areas of competence. As already outlined, Article 7 of the *Loi du 23 décembre 1946* initially declared that in order for the *Conseil d'État*'s competence to emerge in such cases, the damage must have been caused by the State, the province or the commune.¹²⁶⁶ When the Law of 3 June 1971 subsequently altered the wording of Article 7 to replace '*État, province, commune*' with the simple expression of '*autorité administrative*', the *Conseil*'s overall competence was reduced, contrary to the law-makers intentions, to compensatory claims, which were purely based on damage caused by administrative authorities.¹²⁶⁷ Thus, the practical application of the change in terminology yielded contrary results and noticeably limited the *Conseil d'État*'s ambit of jurisdiction.¹²⁶⁸

Despite these new restrictions, the *Conseil* nevertheless resumed competence in cases where damage had been incurred indirectly by a law. This was the case whenever an administrative act had been interposed between a legislative provision and the damage, and the administrative authorities were acting with a certain degree of discretion.¹²⁶⁹ However, in the early 1980s legislative changes in Belgium once

¹²⁶⁴ *CE*, 5 juin 1977, *Collard*, A.P.T., 1977-78, p. 155. The *Conseil d'État*, when consulted about what was to become Article 11 *des lois coordonnées*, expressly underlined that the new amendment excluded any compensation for damage which had been caused directly by a law. This statement did not trigger any reaction by the legislature, which continued to declare in a general manner its intention to expand the competences of the administrative judge.

¹²⁶⁵ LEROY, "Responsabilité des pouvoirs publics...", *supra* note 1247, p. 302.

¹²⁶⁶ See exact wording of Article 7 of the Law of 23 Dec. 1946 under FN 1242.

¹²⁶⁷ This evolution was inevitable in the sense that the notion of '*autorité administrative*' also appeared in the wording of Article 14 *des lois coordonnées* concerning the question of annulment and for which settled case-law had interpreted it as excluding acts performed by the legislature. For a full-text version of the *Lois sur le Conseil d'État, coordonnées le 12 janvier 1973* consult www.raadvst-consetat.be/?page=proc_admin_law&lang=fr.

¹²⁶⁸ *Conseil d'État*, *Collard c/ Etat belge représenté par le ministre de la Justice*, 29 juin 1977, *RACE*, pp. 849 *et seq*; *CE*, 30 avril 1980, *RACE* 1980, p. 563.

¹²⁶⁹ See PARDON and DALCQ, "La responsabilité...", *supra* note 1243, p. 201, para. 34.

again significantly altered the daily practice of the courts regarding the question of State liability for breaches of law incurred by the national legislature.¹²⁷⁰

Since 1984 the then newly established *Cour d'Arbitrage* has been awarded “specialised constitutional jurisdiction”,¹²⁷¹ which consisted of the competence to exercise partial judicial control by verifying the conformity of laws, *décrets* and *ordonnances* with certain principles enshrined in the Belgian Constitution.¹²⁷² Even though the Court’s ambit of review has been limited to test the conformity with only certain constitutional provisions, the general nature of these constitutional principles in reality opens up a wide field of analysis for the Court. Moreover, if requested by a court, a tribunal or a judge in the form of a prejudicial question, the *Cour d'Arbitrage* also has the competence to issue a preliminary ruling. In case a law turns out to be “unconstitutional”, the *Cour d'Arbitrage* has the power to suspend and subsequently annul the law.¹²⁷³ The implications of such annulment by the *Cour d'Arbitrage* were regulated in the *Loi du 10 mai 1985 relative aux effets des arrêts d'annulation rendus par la Cour d'Arbitrage*, which was later amended by the *Loi spéciale du 6 Janvier 1989 sur la Cour d'Arbitrage*.¹²⁷⁴ It was on the basis of these legislative changes that the court eventually endorsed the possibility of holding the State liable for the enactment of a law, which violated certain constitutional principles.

In his article on the question of State liability for legislative breaches, Leroy takes a pragmatic approach to show that the emergence of the *Cour d'Arbitrage*, with all its different functions, served as a catalyst for the development of a “*logique de l’indemnisation*” for legislative breaches too. In other words, in Leroy’s opinion, the

¹²⁷⁰ LEROY, “Responsabilité des pouvoirs publics...,” *supra* note 1247, pp. 299 *et seq.*

¹²⁷¹ FRANCIS DELPÉRÉE, “Constitutional Law” in H. Bocken and W. De Bondt (eds.), *Introduction to Belgian Law* (Bruxelles/The Hague/London/Boston, Bruylant/Kluwer Law International, 2001), p. 63.

¹²⁷² The Court has the power to review national laws for their compliance with Articles 10 and 11 (rules of equality and non-discrimination), as well as Article 24 (general principles related to the organization of education) of the Constitution. Furthermore, the Court exercises judicial review of legislation with respect to those constitutional principles that regulate *inter alia* the division of competences between the federal State and the regions. PARDON and DALCQ, “La responsabilité...,” *supra* note 1243, p. 201.

¹²⁷³ JEAN LAENENS and GEORGE VAN MELLAERT, “The Judicial System and Procedure” in H. Bocken and W. De Bondt (eds.), *Introduction to Belgian Law* (Bruxelles/The Hague/London/Boston, Bruylant/Kluwer Law International, 2001), p. 89.

¹²⁷⁴ Access to these basic legal texts is provided under www.arbitrage.be/fr/common/home.html.

creation of a compensatory mechanism for harm caused by legislative breaches was only a logical implication of the *Cour d'Arbitrage*'s power of judicial review.¹²⁷⁵ Bearing all this in mind, Leroy's approach was solidified by two main arguments. On the one hand, the procedure of *recours en annulation* of legislative acts had been paired with the possibility of lodging a request with the *Cour d'Arbitrage* for suspension of the legal norm concerned. Such an option had been granted in case the execution of the respective norm would risk causing serious and almost irreparable damage. However, according to Leroy, a possibility of suspending the application of a legal norm as a precautionary measure to avoid causing severe damage had to imply that in all other cases where the damage would not be as serious, there had to be a mechanism to repair the harm done to the individual.¹²⁷⁶ If not, this would result in a differential treatment of harmed individuals comparable to an all-or-nothing approach depending on the gravity of the damage incurred. Such differentiation would clearly violate the principle of equality before the law and the maxim of non-discrimination. Given the fact that these principles form the constitutional backbone of all Belgian laws, such a procedure would constitute a contradiction in itself. In short, the suspension of certain legal norms only made sense if one presupposed that the damage caused by them would be repaired in all other cases.¹²⁷⁷

On the other hand, Leroy stipulated that the annulment of a law would necessarily imply the annulment of all its cases of application. These cases would consequently create an individual's right to compensation for whatever harm had been caused by the application of the law. However, if at the same time the jurisprudence did not confirm the individual's right to compensation for harm caused directly by an irregular legislative act, it would lead to an unjustifiable distinction between damage resulting directly from a law and damage caused by an executive measure that was based on the same irregular legal provision. Such differentiation in an individual's right for compensation would again have untenable consequences.¹²⁷⁸ The creation of

¹²⁷⁵ LEROY, "Responsabilité des pouvoirs publics...", *supra* note 1247, p. 320.

¹²⁷⁶ *Ibid*, pp. 320 *et seq.*

¹²⁷⁷ *Ibid*, p. 321. See also PARDON and DALCQ, "La responsabilité...", *supra* note 1243, pp. 200 *et seq.*

¹²⁷⁸ LEROY, "Responsabilité des pouvoirs publics...", *supra* note 1247, pp. 330 *et seq.*

a procedure of cancellation of legislative acts was to be echoed in the normative framework of general public liability so as to safeguard the reparation of damage originating from a law, a *décret* or an *ordonnance*, which the *Cour d'Arbitrage* had declared unconstitutional. Leroy's progressive arguments could be applied in the same manner to cases of State liability for judicial breaches in Belgium. However, this is a separate question which we will address in detail later.

Consistent with the line taken in the literature at the time, the judiciary eventually found a way to reconcile the principle of unconditional respect for the law with the basic duty of judges to protect the subjective rights of Belgian citizens.¹²⁷⁹ The creation of the *Cour d'Arbitrage*¹²⁸⁰ and its competence to partially review national legislation for compliance with specific principles of the Belgian Constitution significantly changed the regime of State liability for legislative breaches in Belgium.¹²⁸¹ As mentioned earlier on, in the course of such *recours objectif* the *Cour d'Arbitrage* had been awarded the power to suspend and subsequently annul the law in question. From there, it was then only a logical next step to introduce a right to compensation for those individuals who had been harmed by the application of such an unconstitutional norm. Nevertheless, an individual's liability claim was only going to be successful in cases when the legislative power exceeded its competence or committed a constitutional breach. Moreover, only after the *Cour d'Arbitrage* confirmed a legislative irregularity in the process of an action for annulment ('*recours en annulation*') or in a reply to a preliminary question¹²⁸² was there the possibility of lodging a remedial claim against the State for damages caused by the legislative breach. Within these limits, the State's liability for breaches of law by the legislature

¹²⁷⁹ ANDERSEN, "Quelques réflexions...", *supra* note 1188, p. 393.

¹²⁸⁰ On 7 May 2007 the *Cour d'Arbitrage* of Belgium has been officially renamed *Cour constitutionnelle*. See www.arbitrage.be/fr/common/home.html. In the remainder of this thesis we will use the Court's current name, *Cour constitutionnelle*, accordingly.

¹²⁸¹ As mentioned earlier in this chapter, the provisions of the *Loi du 10 mai 1985 relative aux effets des arrêts d'annulation rendus par la Cour d'arbitrage* were later amended by the *Loi spéciale du 6 janvier 1989 sur la Cour d'arbitrage*. Electronic access to full-text versions of these basic laws are available under www.arbitrage.be/fr/common/home.html.

¹²⁸² LEROY, "Responsabilité des pouvoirs publics...", *supra* note 1247, pp. 320 *et seq.*

neither violated the Belgian constitution nor was it irreconcilable with the basic constitutional principle of separation of powers.¹²⁸³

The current situation under Belgian law is therefore that State liability claims for harm incurred by the legislature are limited according to the field of constitutional review accorded to the *Cour constitutionnelle*, as the prior annulment of the relevant norm by the Constitutional Court is a prerequisite for such claims. As mentioned above, with respect to the violation of international law by the legislature, individuals have an unconditional right to apply for compensation. This is the case since the supremacy of international law was explicitly recognized in a judgment by the *Cour de Cassation* in 1971.¹²⁸⁴ However, at this point it is important to add that such primacy only applies if the international norm is directly effective within the Belgian legal order.

2. The principle of State liability for judicial breaches in Belgium

Despite the fact that the *Conseil d'État* was faced with similar problems when it came to questions of compensation for damage caused to individuals by a judicial act, until the reform of 1971 the jurisprudence on the matter did not develop in a comparable way.¹²⁸⁵ Even though the notion of '*État*' as understood in the original version of the law of 1946 did not explicitly exclude the judicial branch, the *Conseil d'État* initially declared that it was not competent to rule upon liability claims for damages resulting from acts of the judiciary.¹²⁸⁶ In the same manner, the *Conseil* had previously rejected the possibility of dealing with State liability claims for legislative acts. After the judgment in *Nuyten et Flamey* of 21 May 1969, however, in which the Court had proclaimed its competence to deal with liability claims for legislative

¹²⁸³ DONY, "Le Droit Belge," *supra* note 1178, pp. 160-161.

¹²⁸⁴ For a brief overview on the question of State liability for legislative breaches see, amongst others, R. O. DALCQ, "Rapport de synthèse", *La Responsabilité des Pouvoirs Publics: Actes du Colloque Interuniversitaire organisé les 14 et 15 Mars 1991 par la Faculté de Droit de l'Université Catholique de Louvain et la Faculté de Droit de l'Université Libre de Bruxelles* (Bruxelles, Conseil de l'Europe, Legal Affairs; Bruylant, 1991), pp. 503 *et seq.*

¹²⁸⁵ COMPERNOLLE, "Considérations sur la responsabilité...", *supra* note 1033, p. 49.

¹²⁸⁶ See, for example, *CE*, 6 juin 1952, *Mertens*, *RJDA*, 1953, p. 7; *CE*, 23 novembre 1956, *Indeherberg*, *RACE*, 1956, p. 710; *CE*, 10 février 1966, *Audouin*, *RACE*, 1966, p. 119; *et al.*

breaches, one could have expected that the *Conseil* would apply the same logic for cases where the damage resulted from judicial acts.¹²⁸⁷ But despite the declaration of competence for legislative breaches, the *Conseil* reconfirmed its incompetence to rule upon claims for damages which had been caused by the State in the exercise of its judicial power.¹²⁸⁸

The amendments introduced by the Law of 3 June 1971 were not such as to change the *Conseil*'s generally restrictive tendency in this context. As mentioned before, the modified wording according to which the damage had to be incurred by an 'autorité administrative' entirely excluded all compensatory claims concerning acts performed by any other branch of the State than the executive. Excluded were therefore also those acts, which emanated from the judiciary. Long before the judgment in the case *Collard* on 29 June 1977,¹²⁸⁹ which corroborated the Court's general refusal to rule over compensatory claims for damage resulting from a legal provision, the *Conseil d'État* had already re-confirmed that it was not competent to hear claims for compensation for damage which had been caused by a judicial act.¹²⁹⁰ Moreover, the theory of '*l'équilibre entre les droits des propriétaires voisins*', which had been instituted by the judgments of the *Cour de cassation* of 6 April 1960, was essentially applicable to damages caused by public works in the ambit of the administration's activities and can certainly not be applied to acts of a judicial nature.¹²⁹¹

It was the inapplicability of all these compensatory schemes on damage resulting from a judicial act which finally led Jérôme Sohier to propose a more proactive approach in the form of an intervention by the legislature.¹²⁹² In his article on

¹²⁸⁷ In this sense also W. Van Assche in his Opinion preceding the judgment *CE*, 21 mai 1969, *supra* note 1259.

¹²⁸⁸ *CE*, 1^{er} octobre 1910, *Renson*, *RAACE*, 1910, pp. 109 *et seq.*

¹²⁸⁹ *CE*, 29 juin 1977, *Collard*, *supra* note 1268, pp. 849 *et seq.*

¹²⁹⁰ See discussion in previous section.

¹²⁹¹ See preceding discussion in this chapter.

¹²⁹² SOHIER, "Responsabilité sans faute...", *supra* note 1218, p. 397. A similar proposal had already been launched by the first instance court of Brussels in its judgment of 24 December 1987 in the *Anca* case. In the same manner, M. Dony stated in his *rapport* on the case, in which he elaborated upon the

the issue he suggested two different possibilities on how to implement his proposal. The first concerned a modification of Article 11 *des lois coordonnées sur le Conseil d'État* with respect to the question of compensation. He suggested adding a paragraph declaring that the *Conseil d'État* was also competent under the same conditions to rule over questions of State liability for judicial breaches.¹²⁹³ In addition, he proposed a second possible option, which considered the introduction of a specific regime of State liability *sans faute* for actions emanating from the judiciary, similar to the model that had been used in 1973 to remedy unjustified detention on remand.¹²⁹⁴

Generally speaking, the evolution of Belgian law with respect to the question of State liability for judicial breaches is quite remarkable and differs from any of the national prototypes we have encountered so far in the previous chapters. In Belgium the principles of public liability for breaches of law by the judiciary were not – as in most neighbouring jurisdictions¹²⁹⁵ – based on a legislative framework. Instead, the prevailing system in Belgium owes its existence to the creativity of the national jurisprudence in developing such a principle in its case-law. This is an exceptional feature that the Belgian law on State liability shares with the prevailing system of Member State liability on the Community level, which, for want of a specific rule in the EC treaties, has been established on the basis of the CJEU's jurisprudence. Likewise, it was against the background of an absence of national legislation that the

question of State liability induced by fault of the judicial power, “*qu'il appartient au législateur d'étendre, s'il échet, les cas où les victimes d'actes posés par les magistrats auraient un recours en indemnité contre l'État belge; que, sans doute, le cas d'une déclaration de faillite injustifiée pourrait-il être retenu*” (Tribunal de première instance de Bruxelles, 24 décembre 1987, *JT*, 1988, p. 159). See also JACQUES VAN COMPERNOLLE and FRANÇOIS RIGAUX, “La responsabilité de l'État pour les fautes commises par les magistrats dans l'exercice de leurs fonctions: Note sur *De Keyser et cts c. Etat belge*, *Cour de Cassation*, 1^{re} chambre, 19 décembre 1991” (1993) *Revue Critique de Jurisprudence Belge*, pp. 294.

¹²⁹³ A legislative proposal modifying Article 11 *des lois coordonnées* had in fact been presented in 1982 and was re-submitted twice, in 1986 and 1989. Even though the proposal merely concerned the State's liability for actions of the legislature, it constituted the perfect model for an inclusion of judicial acts into the scheme of State liability. See *Doc. Parl., Chambre*, 1981-1982, n. 108 as well as *Doc. Parl., Chambre*, 1985-1986, n. 104 (avec avis de la section de législation du Conseil d'État) and *Doc. Parl., Chambre*, 1989-10, n. 1146.

¹²⁹⁴ This second possibility was outlined in a legislative proposal “*réglant la réparation des dommages causés par certains actes non juridictionnels*” which was presented to the Senate on 10 May 1988. For further details directly consult SOHIER, “Responsabilité sans faute...,” *supra* note 1218, pp. 407 *et seq.*

¹²⁹⁵ As we have seen in the previous chapters, in the cases of Austria and England and Wales a normative foundation at least partly regulates the question of State liability for judicial breaches.

judiciary in Belgium pro-actively enhanced the guiding principles on this question. As a result, two groundbreaking rulings by the Belgian *Cour de Cassation* finally affirmed the existence of a general principle of State liability for breaches committed by the judiciary in the exercise of its duties. Furthermore, the Court laid out and specified all the additional prerequisites and elements involved in order to invoke public responsibility for an erroneous judicial act.

Traditionally, the dominant position in the doctrine and the jurisprudence in Belgium had rejected the hypothesis that the State could be held liable for breaches committed by the judiciary. The most common arguments put forward to oppose the introduction of such a regime consisted – similar to other Member States – in the classical objections that such a possibility would violate the principle of *res judicata* and that it would furthermore endanger the independence of the judiciary.¹²⁹⁶ As in France, the only exception under Belgian law to initiate actions against a judge was the restrictive procedure of *la prise à partie*.¹²⁹⁷ Over time, however, it became obvious that besides violations by the executive or the legislature, acts of the judiciary could also potentially cause serious material and moral damage to individuals.

In a paper delivered at the XVth Colloquium of European Law,¹²⁹⁸ which had been organised by the Council of Europe in June 1985, J. Velu had already argued on behalf of Belgium that even in the absence of fault, one would have to ensure that compensation for harm incurred by a judicial act was always granted in two cases. First, if the damage has its origin in an individual's detention on remand, which is not followed by a sentence and where it would be gravely unjust if the individual had to deal with the harm himself. Secondly, according to Velu compensation had to be awarded where the damage had been caused by a final conviction in criminal law, which was annulled, or where harm was the result of a judicial error. However, the

¹²⁹⁶ See observations of a number of different EU Member States in the case C-224/01, *Köbler*, *supra* note 1, paras. 16-29.

¹²⁹⁷ Articles 1140-1147 *Code Judiciaire*.

¹²⁹⁸ VELU, "Essential Elements...", *supra* note 165, pp. 108-112.

latter possibility would not apply if the late revelation of new facts was entirely or partly the applicant's fault.¹²⁹⁹

Acknowledging that severe damage could potentially also be caused by a judicial act, the legislature had in fact taken measures early on to remedy particular specified incidents, which included the cases mentioned by Velu. The liability of the State for judicial breaches in those instances was the result of a targeted intervention by the legislature, which was without doubt stirred by the growing necessity to award some form of compensation to the victims of such judicial error. However, in each case the remedial system of compensation is tied to additional conditions which need to be fulfilled. Moreover, compensation is refused when the consequences of the damaging act do not seem sufficiently serious. In part, this system remains in force until today and manifests itself in the special regulations outlined below.¹³⁰⁰

a) Responsibility *sans faute* as foreseen in particular legislative provisions

i) *Compensation for revision of a judgment in the area of criminal law*

In cases where it is likely that a judicial error has occurred in the course of judicial proceedings, '*les demandes en révision*' constitute an extraordinary form of appeal in Belgium whereby a previous condemnation under civil or correctional law can be annulled.¹³⁰¹ Article 447 *Code d'Instruction Criminelle*,¹³⁰² as amended by the Law of 18 June 1894, foresees that in cases where the *Cour de Cassation* annuls a criminal conviction without remitting the case to a lower instance, or where the lower

¹²⁹⁹ Ibid, pp. 99 *et seq.*

¹³⁰⁰ COMPERNOLLE, "Considérations sur la responsabilité...", *supra* note 1033, p. 50.

¹³⁰¹ Article 443 *Code d'Instruction criminelle* limits the possibility for an application to claim damages to three different cases. First, to cases which are contradictory with respect to each other and in which the victim's proof of innocence is based upon that contradiction. Secondly, to cases where false testimony has been given by a witness against the condemned and finally, to cases when new facts appear which could prove the innocence of the convicted defendant or the fact that a more stringent provision of the criminal law has been applied than the one which the perpetrator had actually breached.

¹³⁰² Hereafter referred to as "*CIS*". See full-text version of the *CIS* at www.cass.be/cgi_loi/legislation.pl.

court to which the case has been remitted acquits the individual, the acquitted defendant has a right not only to a public declaration clearing his name and establishing his innocence, but also to appropriate compensation from public funds.¹³⁰³ The amount of monetary compensation is at the discretion of the government. Since 1973, in cases when the individual was either refused compensation, the amount of compensation had been miscalculated, or the government had not come to a decision on the issue within six months, the accused or his heirs may lodge an appeal with a special Commission, which has been established in the *Loi du 13 mars 1973*.¹³⁰⁴

Alternatively, a second possibility concerns the case where the individual's sentence is only reduced. In this case the individual concerned does not have a right to compensation. However, out of considerations of equity, compensation can nevertheless be awarded. Consequently, it is only in the first case scenario that one can truly speak of strict State responsibility *sans faute* and an obligation of the State to award full compensation to the individual concerned. The second alternative merely opens up a possibility – but clearly not a right – for individuals to receive compensation.

¹³⁰³ Article 447 CIS: “[...] Lorsque la cour de cassation annulera, sans renvoi, une condamnation pour homicide et lorsque la cour de renvoi prononcera l’acquittement de l’accusé ou du prévenu, il sera déclaré, dans l’arrêt, que l’innocence de l’accusé ou du prévenu a été reconnue. [...] Dans les cas prévus à l’alinéa précédent, une indemnité sera allouée, à charge du trésor public, soit au condamné, soit à ses ayants droit. Le montant en sera fixé par le gouvernement. Semblable indemnité pourra être allouée lorsque la peine aura été réduite. Le demandeur en révision, qui succombe, sera condamné aux dépens. L’amende, perçue indûment, sera remboursée avec les intérêts légaux depuis la perception. (Si l’indemnité prévue par les alinéas 3 et 4 est refusée, si le montant en est jugé insuffisant ou si le gouvernement n’a pas statué dans les six mois d’une requête introduite à cette fin par le condamné ou par ses ayants droit, ceux-ci pourront, dans les soixante jours de la décision du gouvernement ou à l’expiration du délai dans lequel il aurait dû statuer, s’adresser à la commission instituée conformément à l’article 28, § 4, de la loi du 20 avril 1874 relative à la détention préventive).”

¹³⁰⁴ This Commission is competent to decide upon the appeal against decisions taken by the Minister of Justice concerning claims of compensation for unjustified detention on remand. It was the intention of the legislature to establish an analogous regime for both claims of compensation for unjustified detention on remand and for those involving appeals in the area of criminal law.

ii) Compensation for unjustified detention on remand

The Law of 13 March 1973¹³⁰⁵ amending the *loi du 20 avril 1874*, also outlined the parameters of a compensatory scheme for victims of arbitrary detention on remand, which continues to be applicable even after the introduction of a new law on the same question in 1990.¹³⁰⁶ The law set up two different regimes of compensation, which need to be distinguished in this context. On the one hand, there is the award of compensation for deprivation of liberty in breach of Article 5 of the European Convention of Human Rights¹³⁰⁷ and, on the other, a compensatory framework for unjustified detention on remand.

The first one of the two cases is regulated in Article 27 of the *loi du 20 avril 1874* and awards a right to compensation to every person who has been the victim of an arbitrary deprivation of liberty in violation of Article 5 ECHR. The claim has to be brought before the *juridictions judiciaires* and is to be directed against the State, represented by the Minister of Justice. The reparation corresponds to a civil right and the compensatory mechanism created by the legislature operates as a fault-based regime of public liability.

Article 28 of the *loi du 20 avril 1874*, as amended by the *loi du 13 mars 1973*, constitutes a second option in this context. It offers a right for compensation to any individual who has been in unjustified detention for a period exceeding eight days. In contrast to the first option, no irregularity need have occurred during the judicial process and the competent judicial officers need not have committed a fault. This option therefore corresponds to a public liability regime *sans faute*: the State is liable even though the judiciary has not committed any fault.

In order to receive compensation under this scheme three conditions nevertheless need to be fulfilled. Firstly, as stated above the detention must have

¹³⁰⁵ *Loi du 13 mars 1973 relative à l'indemnité en cas de détention préventive inopérante.*

¹³⁰⁶ *Loi relative à la détention préventive du 20 juillet 1990.*

¹³⁰⁷ Hereinafter "ECHR".

lasted more than eight days. Secondly, the (continuous) detention must not have been provoked by the behaviour of the individual concerned. Thirdly, the detention has to be unjustified within the meaning of Article 28(1) of the Law of 13 March 1973, which limits its application to four possible scenarios. Article 28(1) is applicable, firstly, if the applicant has been harmed directly by a judicial decision which has already achieved the status of *res judicata*. Secondly, in case the applicant is in possession of present facts or legal arguments, which would save him and also publicly clear his name. Thirdly, in instances when the accused has been arrested or was kept in detention even after the expiry of the action due to prescription; and last but not least, if the accused benefits from a dismissal of the case, which proclaims that the facts submitted in the case do not constitute an infraction.¹³⁰⁸

Consequently, an applicant who has been declared guilty of the facts which led to his/her detention on remand, but whose detention has turned out to be longer than the actual prison time to which he/she had been condemned, is not eligible to receive compensation. The entitlement to receive compensation has furthermore been waived for applicants who are eventually only condemned to pay a monetary fine or applicants, who have benefited from a suspension or from a deferral of their penalty. The special law of 6 January 1989 concerning the *Cour d'arbitrage* extends all those benefits to individuals who have suffered from detention as a result of a judgment that has been revoked following a quashing of the judgment by the Constitutional Court.¹³⁰⁹

Compensatory claims are to be directed against the Minister of Justice, who has to arrive at a decision within six months.¹³¹⁰ Furthermore, the applicant has the possibility to appeal to a special commission in cases when the compensation is refused altogether, the amount of compensation is thought to be insufficient or the

¹³⁰⁸ See Article 28(1)(a-d) of the Law of 13 March 1973.

¹³⁰⁹ *Loi spéciale du 6 janvier 1989 sur la Cour d'arbitrage* (*Moniteur belge*, 7 janvier 1989).

¹³¹⁰ Article 28 § 3 of the Law of 13 March 1973.

Minister has not rendered a decision within the required timeframe.¹³¹¹ In this case the legislature has deliberately retained the power to handle such cases from the courts and tribunals in order to avoid a re-opening of the deliberations in the case. Such competence would only burden the responsible judge with an additional duty of having to decide on the compensation to be awarded to the individual. Moreover, the idea behind it was also to avoid putting a judge in the delicate position of having to criticise the ruling of a superior court, which had, for whatever motive, ordered, confirmed, or maintained the arrest warrant.¹³¹² The power of discretion of the Minister of Justice in this case and, in the case of appeal, of the special commission was limited to decisions on the amount of compensation. However, for reasons of equity they could not refuse the compensation as such.

As in most national legal systems, such special legislative provisions creating extraordinary compensatory mechanisms capture only a small fraction of the large potential of liability claims for judicial breaches. These cases constitute, for the most part, rare exceptions and are therefore also subject to special handling in practice. At the same time, the particularity of these isolated instances must have also implicitly reinforced the theory on the general irresponsibility of the State with respect to all other judicial acts. Eventually, during the 1980s several judicial decisions, among them false declarations of bankruptcy, evidently proved the fact that irreversible harm could also be caused to an individual as a consequence of an unjustified judicial act by a court which no possible appeal could have recompensed.¹³¹³ In response to these rulings a movement emerged in the literature which started to urge for a revision of the until then common principle of irresponsibility of the State for judicial breaches.¹³¹⁴ In the course of the critical debate, certain commentators considered that

¹³¹¹ According to Article 28 § 4 of the Law of 13 March 1973 this special Commission consists of the *premier président de la Cour de Cassation*, the *premier président du Conseil d'État* and the *doyen de l'Ordre national des avocats*.

¹³¹² See *Doc. Parl., Chambre*, 1968-1969, n°472/1, pp. 5-6.

¹³¹³ See for example JEAN-LUC FAGNART, "'Droit de la défense et faillite d'office', *note sous Cass.*, 27 avril 1989" (1990) *Revue Critique de Jurisprudence Belge*, pp. 215 *et seq.*

¹³¹⁴ Marcel Storme, for example, already advocated the principle of State liability for incorrect adjudication by the courts in 1982 at the Congress on Comparative law in Caracas (See in this context MARCEL STORME, "The responsibility of the judge", *Rapports belges au XIe Congrès de l'Académie internationale de droit comparé, Caracas, Venezuela, 29 août - 5 sept. 1982* (Anvers, Kluwer, 1982),

the minimal protection of citizens through the regime of public liability would also have to include the concept of State liability for judicial breaches. Thereby, some authors directly attacked the traditional arguments of *res judicata* and the independence of the judiciary, which had so commonly been used to justify and defend the State's irresponsibility in this matter.¹³¹⁵

Already in 1985 in a paper presented at the XVth Colloquium of European Law in Bordeaux, Velu, who was at that time Advocate General at the Belgian *Cour de Cassation*, had outlined a desirable structure of public liability for judicial acts.¹³¹⁶ Even though his article is by now more than 20 years old, it is still timely as it contains general recommendations and useful suggestions that apply to the current situation in Belgium which, after all, does not seem to have changed drastically over the past two decades. While Velu's proposal covered a wide range of different aspects connected to the contentious issue of State liability for judicial breaches, he also suggested a set of principles that in his opinion were necessary in order to guarantee a minimum level of protection for litigants.¹³¹⁷

Defending the prevalent position in the literature at the time, the authors Compennolle and Closset-Marchal also later subscribed to the opinion that the objection based on the argument of judicial independence was in fact not entirely supportive of the concept of total irresponsibility of the State.¹³¹⁸ In fact, as explained at length in their work, this objection misinterprets the true function of State responsibility and presents the problem from a false perspective. After all, it is not the personal liability of the judge which is at stake but the responsibility of the State.¹³¹⁹

pp. 397-415). He later re-confirmed his position in STORME, "The liability...", *supra* note 274, p. 645 *et seq.*

¹³¹⁵ See, for example, LOUIS-PAUL SUETENS, "The Law of Belgium" in J. Bell and A. W. Bradley (eds.), *Governmental Liability: A Comparative Study* (London, United Kingdom National Committee of Comparative Law, 1991), p. 184; STORME, "The responsibility...", *supra* note 1314, pp. 397 *et seq.*; VELU, "Essential Elements...", *supra* note 165, pp. 105 *et seq.* and COMPERNOLLE and CLOSSET-MARCHAL, "La responsabilité...", *supra* note 866, p. 413.

¹³¹⁶ VELU, "Essential Elements...", *supra* note 165, pp. 77 *et seq.*

¹³¹⁷ *Ibid.*, pp. 97 *et seq.*

¹³¹⁸ COMPERNOLLE and CLOSSET-MARCHAL, "La responsabilité...", *supra* note 866, pp. 413 *et seq.*

¹³¹⁹ *Ibid.*

As the prevalent legislative texts and regulations at the time concerning the procedure of '*la prise à partie*' excluded any claims for compensation directed against a single judge, both authors rejected the fear that the State might resort to recusory actions against the acting judge.¹³²⁰ Moreover, seen through the comparative lens, they pointed to the fact that several foreign legal orders had already successfully introduced a wide-ranging system of State liability for judicial breaches.¹³²¹ The bottom-line in the authors' work is that the principle of independence of single judges and of the judiciary as a whole does not turn out to be incompatible with an all-embracing system of public liability for erroneous acts committed by either one of the three branches of the State.¹³²²

What had more leverage was the second objection raised in this context, namely that the concept of State liability for judicial breaches would violate the principle of *res judicata*.¹³²³ According to the traditional approach and the classical understanding of the legal maxim of *res judicata*, the finality and truth attached to any judgment can only be challenged by means of appeal. The literature at the time therefore suggested that the decision to allow for liability claims against the State on the basis of such final judicial decisions would represent a serious defiance of the principle of *res judicata*. Instead, for the applicant to lodge an appeal would constitute less of a direct challenge to the aforementioned principle.

While Compernelle and Closset-Marchal in general acknowledged the significance of this objection, they nevertheless found considerable flaws in the interpretation and use of this fundamental principle. First of all, the authors consider that the objection of *res judicata* only applies to acts performed by so-called *magistrats du siège*, judges who perform judicial acts *stricto sensu*. This definition

¹³²⁰ See Articles 1140-1147 *Code Judiciaire*.

¹³²¹ The authors mention in this context the system established in France and in Italy.

¹³²² COMPERNELLE and CLOSSET-MARCHAL, "La responsabilité...", *supra* note 866, pp. 413 *et seq.*

¹³²³ This argument, which has been frequently used in this context, keeps reoccurring today and has been raised not only in Belgium, but also in the course of the debate in other Member States. Lately, the question has even been discussed by the Court of Justice itself (see C-224/01, *Köbler*, *supra* note 1, as well as C-453/00, *Kühne & Heitz*, *supra* note 555, *et al*). Thus, we will take a closer look at the concept of *res judicata* in the course of this chapter.

consequently excludes all acts by the public ministry of justice as well as all acts performed by judges who operate outside the classical ambit of judicial work. Moreover, this argument provides no answer to the problem that despite the fact that a judgment is still open to appeal, the claimant may have suffered irreparable harm. In this case the damage would not disappear simply or even after the erroneous judgment in question had been annulled.¹³²⁴

In the midst of the ongoing discussion in the literature on the question of whether to reconsider the fundamental principle of irresponsibility of the State for judicial breaches and against the background of a total silence on the part of the legislature with respect to this issue, the *Cour de Cassation* finally handed down two fundamental judgments in the early 1990s on precisely this question. The Court's *dicta* finally resolved the ongoing debate at the time.¹³²⁵ However, even after those rulings by the *Cour de Cassation*, it remained undisputed that in Belgium, *de lege lata*, a judge could not and still cannot be held personally liable.¹³²⁶

b) Laying the foundations: the ruling in *De Keyser v. Belgian State*

The point of departure and also, in hindsight, the most significant ruling in this respect was the famous *De Keyser* judgment by the *Cour de Cassation* on 19 December 1991.¹³²⁷ In this ruling the Belgian Supreme Court decided that the State was also liable for any tortious act perpetrated by the judiciary. It almost seems like the date of the judgment, 19 December 1991, could be more than mere coincidence.

¹³²⁴ In the course of their work Closset and Compernelle actually proposed a model of State liability for judicial breaches which came strikingly close to the structure established shortly afterwards by the *Cour de Cassation* in the *De Keyser* ruling. See COMPERNELLE and CLOSSET-MARCHAL, "La responsabilité...", *supra* note 866, pp. 431-438.

¹³²⁵ Cass. (1^{re} ch.), 19 déc. 1991, *De Keyser*, *supra* note 232, pp. 151-152 and *Cour de Cassation* (1^{re} chambre), S.P.R.L. "Anderlecht-Cafés", *De Keyser*, *Stoorme c/ État belge* [Ministre de la Justice], 8 décembre 1994, JT, 1994, pp. 497-498.

¹³²⁶ See MARIANNE DONY, "La Responsabilité de l'Etat Pour Faute du Pouvoir Judiciaire", *La Responsabilité des Pouvoirs Publics: Actes Du Colloque Interuniversitaire organisé les 14 et 15 Mars 1991 par la Faculté de Droit de l'Université Catholique de Louvain et la Faculté de Droit de l'Université Libre de Bruxelles* (Brussels, Bruylant, 1991), p. 363.

¹³²⁷ Cass. (1^{re} ch.), 19 déc. 1991, *De Keyser*, *supra* note 232, pp. 151. On this case see also the extensive comments prepared by COMPERNELLE and RIGAUX, "Note sur *De Keyser*", *supra* note 1292, pp. 285 *et seq.*

On 19 November 1991, exactly a month before the decision in *De Keyser*, the CJEU gave its famous *Francovich* ruling on the fundamental tenets of the concept of Member State liability under European Community law.¹³²⁸ In that respect, the Belgian approach towards the concept of State liability as a whole and especially as regards the question of attribution was already very inclusive and exceptionally advanced at the time.

i) The pre-judgment phase

The factual elements of the *De Keyser* case were straightforward. On 1 February 1982 the *Tribunal de Commerce* of Brussels had proclaimed *ex officio* the insolvency of the company *SPRL Anca*. However, the announcement of bankruptcy by the Court had been made without a prior hearing in the course of the proceedings. After an appeal was lodged against the declaration by the company's legal representatives, the *Cour d'Appel* of Brussels rendered a judgment on 16 December 1982, in which it proclaimed that as the *Tribunal de Commerce* had failed to hold a hearing in the case, the Court had in fact violated the principles of the adversarial procedure in the process of giving its judgment.¹³²⁹ Hence, in breach of Article 6 ECHR the Court had violated *Anca's* rights of defence. As a consequence, the *Cour d'Appel* concluded that the declaratory judgment proclaiming the insolvency of the company had been declared in violation of the respective procedural guarantees set out by the ECHR. Due to the violation of Article 6 ECHR the ruling by the *Cour d'Appel* eventually resulted in an invalidation of the declaratory judgment, which had been given by the *Tribunal de Commerce*.¹³³⁰

In the meantime, however, the damage suffered by the company as a result of the declaration of insolvency had already amounted to irreparable harm. In fact, at that point the trustees had sold the company's going business and *SPRL Anca* had already been liquidated. On the basis of Articles 1382 and 1383 of the *Code Civil*, the

¹³²⁸ C-6 & 9/90, *Francovich*, *supra* note 2, paras. 1 *et seq.*

¹³²⁹ On this judgment see also COMPERNOLLE and RIGAUX, "Note sur *De Keyser*", *supra* note 1292, p. 294.

¹³³⁰ *Ibid*, p. 294.

liquidators thereafter launched a liability claim against the State demanding reparation for the damage suffered as a result of the false declaration of bankruptcy by the Brussels Commercial Court, which had ruled in the first instance. By judgment of 24 December 1987, the first instance court in Brussels declared the application inadmissible on the grounds that apart from the exceptional cases of '*la prise à partie*', the liability of the State could not be invoked for a judge acting in the exercise of his or her functions.¹³³¹ The *Cour d'Appel* of Brussels confirmed this decision in a judgment of 21 November 1989.¹³³² At first it seemed like the traditional stance towards the principle of State liability for judicial breaches had been re-confirmed by the jurisprudence. However, on 19 December 1991 the aforementioned ruling was quashed by the *Cour de Cassation* in what was to become its fundamental judgment in the *De Keyser* case. The maxim of total irresponsibility of the State with respect to acts performed by its judiciary had finally been overruled.¹³³³

ii) The ruling in De Keyser

In the *De Keyser* ruling¹³³⁴ the *Cour de Cassation* not only outlined the general scheme of State liability for harm incurred by public authorities, but devoted special attention to answering the specific and until then disputed question of whether the general public liability regime would also apply to a harmful act committed by the judiciary. In other words, could the judiciary be subsumed under the general definition of a public organ for whose actions the State would carry liability? The framework of liability and the applicable limitations to the system also prompted the Court to address not only the necessary protection for the principle of *res judicata*, but also its respect for the fundamental guarantee of the independence of the judiciary.

As a first step, the Court clarified and reconfirmed the core principles which constitute the overarching pillars of the State liability regime in Belgium. The first

¹³³¹ *Civ. Brux.*, 24 déc. 1987, *supra* note 1292, p. 159.

¹³³² *Cour d'appel de Bruxelles*, 21 novembre 1989, *JT*, 1990, pp. 759 *et seq.*

¹³³³ COMPERNOLLE and CLOSSET-MARCHAL, "La responsabilité...", *supra* note 866, p. 51.

¹³³⁴ For an English translation of the most significant parts of the judgment see VAN GERVEN *et al.*, *Tort Law*, *supra* note 238, p. 386.

few lines of the judgment reiterated the importance of (former) Article 92 of the Belgian Constitution of 1831, which serves as the guarantor of the judicial protection of all civil rights.¹³³⁵ The Court argued that in order to protect those rights in the broadest possible manner, the application of (former) Article 92 would only depend on the nature of the right at issue and not on the capacity of the litigating parties or the nature of the act, which allegedly caused the violation. Hence, the judgment once again confirmed that the State was subject to the basic legal framework under civil law concerning reparation of damage whenever one of its organs infringed a citizen's right or legitimate interest. As mentioned before, contrary to the French approach, Belgium has a conjoined system of liability, meaning that the State's liability in tort is regulated by the general civil law provisions on liability, which are contained in Articles 1382 and 1383 of the Belgian *Code Civil*. Accordingly, the State is liable for the conduct of its organs whenever they act within the limits of their statutory powers, or at least where any reasonable and cautious person would accept that the organ has acted in that manner. Furthermore, the Court reiterated that apart from the executive and the legislative branch, the judiciary and its actors also fully qualified as organs of the State.¹³³⁶

Forging a system of State liability for judicial breaches, the *Cour de Cassation* subsequently went beyond the mere acknowledgment of the judiciary as an integral part of the State. According to the judgment's wording, the principles of separation of powers, the independence of the judiciary and its members, and the maxim of *res judicata* did not imply that the State was fully exonerated from general liability and from the reparation of damage caused by its organs. This was also the case for any harm the judicial organs had incurred in the administration of justice and even more so for harmful acts which formed the essence of the judicial function.¹³³⁷ The Court

¹³³⁵ In the Constitution of 27 February 1994 the same right has been guaranteed under Article 144, which states (in the exact same wording as previously Article 92) that “[l]es contestations qui ont pour objet des droits civils sont exclusivement du ressort des tribunaux.”

¹³³⁶ Cass. (1^{re} ch.), 19 déc. 1991, *De Keyser*, *supra* note 232, p. 152.

¹³³⁷ Original version of the judgment Ibid, p. 152: “Attendu que les principes de la séparation des pouvoirs, de l’indépendance du pouvoir judiciaire et des magistrats qui le composent, ainsi que de l’autorité de la chose jugée n’impliquent pas que l’État serait, d’une manière générale, soustrait à l’obligation, résultant des dispositions légales précitées, de réparer le dommage causé à autrui par sa

further clarified that the liability of the State was not automatically excluded whenever the responsible organ could not be held personally liable for any of its actions. An exemption from personal liability could occur either because the act's perpetrator was unidentifiable or because the organ relied on a special exoneration such as the occurrence of an '*erreur invincible*' or '*force majeure*'.¹³³⁸ The same protection applied if the act constituted a fault giving rise to liability, from which the organ itself had simply been exempted.¹³³⁹

After spelling out those general guidelines, the Court proceeded to a detailed rendition of the concept of State liability for judicial breaches under Belgian law. In doing so, the *Cour de Cassation* proclaimed what in hindsight constitutes not only the core of the *De Keyser* ruling, but also of the Belgian State liability scheme for judicial breaches as such:

[q]u'en l'état actuel de la législation, l'Etat peut, sur la base des articles 1382 et 1383 du Code civil, être, en règle, rendu responsable du dommage résultant d'une faute commise par un juge ou un officier du ministère public lorsque ce magistrat a agi dans les limites de ses attributions légales ou lorsque celui-ci doit être considéré comme ayant agi dans ces limites, par tout homme raisonnable et prudent; que toutefois, si cet acte constitue l'objet direct de la fonction juridictionnelle, la demande tendant à la réparation du dommage ne peut, en règle, être reçue que si l'acte litigieux a été retiré, réformé, annulé ou rétracté par une décision passée en force

faute ou celle de ses organes dans l'administration du service public de la justice, notamment dans l'accomplissement des actes qui constituent l'objet direct de la fonction juridictionnelle."

¹³³⁸ The notion of *force majeure* has been defined in a judgment of the *Cour de Cassation* on 15 May 1930 as "an event, which the defendant had not caused, which he reasonably cannot avoid, and which makes it impossible for him to live up to the standard of conduct." (*Cour de Cassation*, 15 mai 1930, *Pas.*, 1930, I, p. 223). Translation from French into English as in BOCKEN, "Tort Law," *supra* note 1190, p. 250.

¹³³⁹ Original text of the judgment *Cass. (1^{re} ch.)*, 19 déc. 1991, *De Keyser*, *supra* note 232, p. 152: "[L]a responsabilité de l'Etat n'est [...] pas nécessairement exclue par le fait que celle de son organe ne peut, quant à elle, être engagée à la suite de l'acte dommageable que celui-ci a commis, soit que l'organe ne soit pas identifié, soit que l'acte ne puisse être considéré comme une faute de l'organe en raison d'une erreur invincible de celui-ci ou d'une autre cause d'exonération de responsabilité le concernant personnellement, soit que cet acte constitue une faute mais que l'organe soit personnellement exonéré de la responsabilité pouvant en découler."

*de chose jugée en raison de la violation d'une norme juridique établie et n'est plus, dès lors, revêtu de l'autorité de la chose jugée.*¹³⁴⁰

In this ruling the *Cour de Cassation* established a system of State liability as had already been in place for administrative and the legislative breaches, but was henceforth also applicable to erroneous acts incurred by the judicial branch. The detailed terms of this liability regime were outlined following the general affirmation that the State was in fact to be held responsible for tortious acts by the judicial organs.

However, the implementation of such liability was tied to specific conditions. According to the Court, the liability of the State could principally be invoked on the basis of Articles 1382 and 1383 of the *Code Civil* for any damage caused by fault of a judge or a public prosecutor under the condition that he or she had acted within the limits of his/her legal powers or at least would be regarded by a reasonable and cautious person as having done so. Following this ample definition, the Court introduced a significant restriction concerning acts pertaining to the essence of the judicial function. Yet it is not entirely clear which judicial acts precisely the Court intended to include in this specific category. According to the formulation used by the Court, acts which constitute “*l’objet direct de la fonction juridictionnelle*”¹³⁴¹ would most likely comprise all judicial decisions *stricto sensu*, i.e. judicial acts that are capable of acquiring the force of *res judicata*. With a view to protecting the authority of final judicial decisions as well as the coherence of the judicial system as such, the *Cour de Cassation* therefore introduced the general restriction that the claim for compensation could only be entertained if the act under review had previously been withdrawn, amended, annulled or retracted by a final decision on the grounds of a breach of a well-established legal norm, whereby the initial decision had lost the authority of *res judicata*.¹³⁴² Within these limits, according to the Court, the maxim of *res judicata* would be fully respected. Consequently, a liability claim on the basis of a final but erroneous judicial decision would have to be dismissed. In short, with

¹³⁴⁰ Cass. (1^{re} ch.), 19 déc. 1991, *De Keyser*, *supra* note 232, p. 152 (emphasis added).

¹³⁴¹ *Ibid.*, p. 152.

¹³⁴² *Ibid.*

consideration to the aforementioned restrictions, the Court tried to reconcile the principle of State liability with the authority of final judicial decisions. Accordingly, having spelled out an entirely new concept of State liability, the *Cour de Cassation* finished its ruling by quashing the disputed judgment of the Court of Appeal.¹³⁴³

In sum, in the *De Keyser* ruling the *Cour de Cassation* eventually brushed aside the traditional objections usually advanced in this context. According to the Court, the independence of the judiciary was not endangered by the fact that the State could be held liable for a wrongful act performed by a judge. In addition, the argument related to the maxim of *res judicata* was no longer used. However, while acknowledging that the principles outlined in its previous case-law on State liability also applied to judicial actions, the *Cour de Cassation* at the same time introduced significant restrictions in this particular context. In order to preserve the coherence of the system, which did not allow for other ways to review a judgment than through the regular system of appeals, the decision by the Court specified that a liability claim against the State for damage sustained on the basis of a judgment was only admissible if the decision, which had caused the damage, had been previously withdrawn, amended, annulled or retracted on the ground of a breach of an established legal rule.¹³⁴⁴ In fact, if this condition was fulfilled the judicial act would no longer have the authority of *res judicata*. As a result, the liability claim would rely upon the act of revision, revocation or annulment in order to confirm the irregularity of the relevant judgment. Thus, contrary to French, Italian or Dutch law but in harmony with the legal framework in Luxembourg, Belgian law does not limit the potential liability of the State for erroneous judicial acts according to the requirement of fault.¹³⁴⁵ We encounter a similar situation in Luxembourg where the State's liability for judicial breaches is expressly mentioned in the Law of 1 September 1988 on the liability of the State and other public entities, which admits State liability for the inadequate functioning of the

¹³⁴³ For an English translation of the essential parts of the judgment see VAN GERVEN *et al.*, *Tort Law...*, *supra* note 340, p. 374 *et seq.*

¹³⁴⁴ On this point see also *Civ. Bruxelles (72^e chambre)*, *C... c. Etat belge [ministre de la Justice et ministre de l'Intérieur]*, 17 septembre 2003, *JT*, 2004, pp. 221 *et seq.* VAN GERVEN *et al.*, *Tort Law...*, *supra* note 340, p. 377.

¹³⁴⁵ See Chapter V for an analysis of the French, Italian and Dutch approach towards the question of State liability for judicial breaches.

judiciary, including preparing acts, the judgments itself and consequences of a judgment.¹³⁴⁶

It is noteworthy that the annotated judgment was given exactly one month after the *Francovich* ruling on the Community level, in which the CJEU had established that the concept of Member State liability for breaches of Community law was a principle inherent in the system of the EC Treaty. As was put beyond doubt in this context in the CJEU's subsequent judgment in the case *Brasserie du Pêcheur*, this principle of Community law applied regardless of

whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive...since all State authorities...are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.¹³⁴⁷

In the *De Keyser* case, the *Cour de Cassation* had not been asked to decide upon the detailed conditions necessary in order to invoke a public liability claim for judicial breaches nor was the Court asked to rule on the question of fault or the definition of causality. The essential outcome that emerged from this case merely concerned the basic question of whether such a claim was generally admissible under Belgian law.¹³⁴⁸ While the wording of the judgment itself proves to be rather short, it is the detailed and meticulous analysis in the Opinion of Advocate General Velu, which provides a clear insight into the reasoning and line of argument that might have influenced the development of such innovative jurisprudence by the *Cour de Cassation*.¹³⁴⁹

¹³⁴⁶ *Loi du 1er septembre 1988 relative à la responsabilité civile de l'Etat et des collectivités publiques, Article 1: "L'État et les autres personnes morales de droit public répondent, chacun dans le cadre des ses missions de service public, de tout dommage causé par le fonctionnement défectueux de leurs services, tant administratifs que judiciaires, sous réserve de l'autorité de la chose jugée."*

¹³⁴⁷ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 34.

¹³⁴⁸ COMPERNOLLE, "Considérations sur la responsabilité...", *supra* note 1033, p. 52.

¹³⁴⁹ Advocate General Velu in *Cass. (1^{re} ch.)*, 19 déc. 1991, *De Keyser*, *supra* note 232, pp. 142 *et seq.*

c) Opinion by Advocate General Velu

The extensive submission by the Advocate General in the *De Keyser* case is an ample discussion of the general concept of State liability for judicial breaches and it offers a systematic analysis of the objections that might prevent the implementation of such a regime in Belgium. Velu immediately acknowledged the distinctiveness of the status and the functions of the judiciary, which would call for certain restrictions and limitations to the general principle of State liability. Accordingly, Velu's tripartite analysis was focused on the three core points of contention surrounding the introduction of such a system of liability, which were the principle of independence of the judiciary, the maxim of *res judicata* and, as a final element, the "*théorie de l'organe*". The latter element elaborated on the debate of whether the judiciary, like the executive and the legislature, was to be classified as yet another organ of the State or whether it enjoyed a special position within the architecture of the State. The judgment of the *Cour de Cassation* in this specific case subsequently also touched upon all of these issues. Furthermore, it is noteworthy that an elaborate debate of the same points of contention can not only be found in the Opinion of Advocate General Léger in the *Köbler* case, but also in the CJEU's final judgment in *Köbler*.¹³⁵⁰

i) The principle of independence of the judiciary

Until today the basic guarantee of judicial independence is a reoccurring theme in the context of the debate on State liability for judicial breaches. Advocate General Velu dedicated the entire first section of his analysis to a detailed discussion of the principle of independence of a single judge and of the judiciary as a body in light of the principle of separation of powers. Despite the fact that the Advocate General was in favour of a public liability regime that embraced also the judiciary, he nevertheless underlined the importance of the principle of judicial independence and the basic maxim of separation of powers. Furthermore, Velu considered it to be an undeniable fact that personal liability of judges would severely impact the judicial decision-

¹³⁵⁰ See Opinion of Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, paras. 88-91 and 95-106, as well as paras. 37-50 in the CJEU's judgment itself.

making process and stated, as the Court rephrased it in its later judgment that “*si ces derniers devaient craindre, lorsqu’ils délibèrent, qu’ils puissent être impliqués personnellement, leur indépendance serait irrémédiablement compromise.*”¹³⁵¹

The independence of the judiciary constitutes a fundamental legal principle, which is not only protected under Article 6 of the European Convention of Human Rights, but which is also reiterated in several other international treaties as well as in a large number of different national constitutional and legal provisions. Under Belgian law, the principle of independence, the organisation and the fields of competence of the judiciary are regulated in what is now Articles 144 to 161 of the Belgian Constitution of 1994.¹³⁵² Furthermore, the independence of the judiciary is fully protected by Articles 1140 to 1147 *Code Judiciaire*, which regulate the exceptional procedure of ‘*la prise à partie*’.¹³⁵³ To this assertion the Advocate General added that except for the limited cases of personal liability falling under Articles 1140 to 1147 *Code Judiciaire* and for those instances when the judge has committed a criminal offence, it was neither debatable nor had it ever been a question of debate that the principle of judicial independence effectively shielded and protected judges in general from any civil liability claim based on Articles 1382 and 1383 of the *Code Civil*. In fact, as summarized by the *Cour de Cassation* in *De Keyser* “*l’exercice serein de la difficile fonction de juger est inconciliable avec l’application aux juges eux-mêmes des règles de droit commun de la responsabilité.*”¹³⁵⁴ In other words, apart from the exceptional cases mentioned before, the members of the judiciary enjoy total immunity from personal liability proceedings.

As much as Velu subscribed to all the abovementioned considerations, he also correctly pointed out that in reality the point of contention in the debate concerning

¹³⁵¹ Cass. (1^{re} ch.), 19 déc. 1991, *De Keyser*, *supra* note 232, p. 152.

¹³⁵² Former Articles 92 to 107 of the Belgian Constitution of 1831.

¹³⁵³ Article 1140 *Code Judiciaire*: “*Les juges peuvent être pris à partie dans les cas suivants: (1) s’ils se sont rendus coupables de dol ou de fraude, soit dans le cours de l’instruction, soit lors des jugements; (2) si la prise à partie est expressément prononcée par la loi; (3) si la loi déclare les juges responsables à peine de dommages-intérêts; (4) s’il y a déni de justice.*”

¹³⁵⁴ Cass. (1^{re} ch.), 19 déc. 1991, *De Keyser*, *supra* note 232, p. 152.

the State's liability for the judiciary was an entirely different one.¹³⁵⁵ In Velu's understanding, the real question at stake was whether in the context of the principle of separation of powers, the axiom of judicial independence would hinder not so much the personal liability of a judge, but the liability of the State. However, the Advocate General dismissed such fear as unfounded, claiming that the principle of independence of judges and the judiciary was sufficiently safeguarded by the impossibility of invoking a judge's personal liability. The few exceptions to this general rule were restricted to the rare cases when a judge had committed a crime and to those instances falling under the provisions of '*la prise à partie*'.

An objection, which was raised by several authors in this context, was the argument that as long as the State had a right to initiate a recovery action against the judge who was responsible for the damage, the State's liability for judicial breaches would still endanger the principle of independence of the judiciary. According to the Advocate General, however, even that particular objection did not have any validity since *de lege lata* recovery actions by the State were not even mentioned under Belgian law. But even in the event that they did exist, Velu dismissed all related concerns by comparing it to the situation in France, where despite the fact that the State could be held liable for judicial breaches and in spite of the State's right to take recursory actions against judges, the principle of independence of the judiciary had never been threatened.¹³⁵⁶ Another comparative example that was mentioned in this context was the case of Italy, where the Constitutional Court had ruled that the Italian State liability regime, which also legally acknowledged recursory actions by the State, was in full compliance with the constitutional provisions guaranteeing the independence and the impartiality of the judiciary.¹³⁵⁷

¹³⁵⁵ Advocate General Velu, Opinion in Ibid, p. 143, para. 42.

¹³⁵⁶ The same argument had been advanced by COMPERNOLLE and CLOSSET-MARCHAL, "La responsabilité...", *supra* note 866, p. 437.

¹³⁵⁷ Decision by the Constitutional Court on whether the Law of 13 April 1988 was in conformity with the Italian Constitution (*Corte Costituzionale, Sentenza 18/1989* of 11 January 1989).

ii) The maxim of res judicata

The second aspect in the list of contentious questions, which were central to the argument of the Advocate General, was the problem of how to reconcile the concept of State liability for harmful acts committed by the judiciary with the principle of *res judicata*.¹³⁵⁸ In his analysis, Velu focused on the interplay between the maxim of *res judicata* and the legal framework that had been implemented in Belgium in order to provide for a coercive system of appeal. The crux of the problem was the question whether the finality of a judicial act would perpetuate a continuous conflict with the application of the concept of State liability for judicial breaches. Velu's reasoning was based on the fact that in the course of liability proceedings the competent court would be required to review, even if only in an indirect manner, the contended judgment, which might by then, however, already be vested in the authority of *res judicata*. Moreover, Velu predicted that attempts by an individual to rebut an allegedly harmful judgment on all fronts would lead to the parallel application of (extra-) ordinary remedies in addition to the claim for damages against the State. This, according to Velu, would inevitably lead to serious substantial and procedural entanglements.¹³⁵⁹

An additional contention raised by the Advocate General, which is usually brought to the fore of the debate in this context, concerned the primary use of legal remedies that have been provided by the legislature in order to warrant an (extra-)ordinary appeal against an allegedly unfair or harmful judgment. The viable option of appeal, as it was generally argued, would provide for a sufficient guarantee for the individual to combat any damage he/she had unjustly endured by an erroneous judgment. Judges could err like any other human being and precisely for that reason the legislature had appointed a higher judicial instance to revise judgments which had been wrongly decided by a lower instance court.¹³⁶⁰ Generally speaking, arguments

¹³⁵⁸ The conflict surrounding the principle of *res judicata* and State liability claims in general had been raised already in 1977 in A. VANWELKEN-HUYZEN, "L'autorité de la chose jugée par le Conseil d'État, devant le juge saisi de l'action en responsabilité" (1977) *Revue Critique de Jurisprudence Belge* 31, pp. 436 *et seq.*

¹³⁵⁹ *Conclusions Avocat Général Velu in Cass. (1^{re} ch.), 19 déc. 1991, De Keyser, supra note 232, pp. 144 et seq.*

¹³⁶⁰ *Ibid*, p. 144.

broaching the principle of *res judicata* seem to be manifold and of timeless validity as they have persisted in the literature until today.¹³⁶¹ However, in support of an all-encompassing system of State liability in Belgium, Advocate General Velu sought to counter every single one of these contentious points in his Opinion on the case, while at the same time providing insightful criticism and thoughtful commentary on the issue.

First, the Advocate General asserted that in the context of State liability for judicial breaches the alleged violation of the principle of *res judicata* would only apply – if at all – to judicial decisions as understood in the narrow sense of the term. The latter definition embraced all judicial acts, which were bound to endorse the authority of *res judicata*. Terminologically speaking, the objection of *res judicata* would certainly not cover acts lying within the ambit of what constituted an inclusive or wide definition of judicial acts, which, for example, also incorporated administrative acts upholding the smooth functioning of the judicial apparatus. In light of the fact that the present analysis has from the very outset been limited to such narrowly-defined judicial acts or judicial acts *stricto sensu*, as we have frequently referred to them, Velu's initial argument, even though significant, is not of direct relevance for the purposes of this study.

Furthermore, the Advocate General argued that the principle of *res judicata* was inoperable with respect to judgments that have been annulled, withdrawn, amended or retracted. Such restrictions were based on the fact that technically, the principle of *res judicata* had a very narrow definition under civil law, presupposing the famous “triple identity” of object, cause and parties.¹³⁶² The maxim of *res judicata* only held in cases of identical claims that were based on the same foundation, existed between the same parties and had been formulated by them or against each other in the same capacity. When an application for damages was brought against the State for harm incurred by a final judicial decision, these conditions were generally not fulfilled as the claim was,

¹³⁶¹ See in-depth discussion of the principle of *res judicata* in the last section of this chapter.

¹³⁶² *Conclusions Avocat Général Velu in Cass. (1^{re} ch.), 19 déc. 1991, De Keyser, supra note 232, p. 145.*

in most instances, introduced against a different party than the original adversarial party. Moreover, in such a case the object and the reasoning of the two claims were going to be different. Therefore, as Velu concluded in his Opinion in the *De Keyser* decision, the claim for general irresponsibility of the State could not be justified by the principle of *res judicata*.¹³⁶³

Opposing the idea of general impunity of the State for the actions of its organs, Velu also held that there was a substantial number of judicial acts (in the wide sense of the term), which could not be reviewed within the regular system of appeals provided for by procedural law.¹³⁶⁴ Specific judicial decisions were taken in first and last instance and such rulings could only be contested by use of extraordinary remedies such as a public liability claim. Another important point raised by Velu was the fact that the national legal remedies guaranteed under procedural law were to a larger extent targeted at securing the legality of a judicial decision rather than at satisfying the victim's demand for compensation. Resorting to the system of (extra-)ordinary remedies by appeal, annulment or withdrawal constituted in most instances an effective way to put an end to the continuous harm, which would emerge from a judicial decision in the future. The act of appeal, withdrawal or annulment of a judicial decision, however, did not necessarily compensate the victim for the damage he/she had sustained in the past. In this context, Velu also contested the widely used argument that an individual could easily resort to extraordinary remedies such as '*la prise à partie*'. Moreover, the Advocate General underlined that, contrary to common belief, the silence on the part of the legislature concerning the question of when to open a procedure of '*la prise à partie*' against a judge did not automatically imply that for those cases concurrent liability of the State could simply be excluded.¹³⁶⁵

¹³⁶³ In this sense also CYR CAMBIER, "La responsabilité de l'Etat pour le comportement illégal de ses organes" in H. Mosler (ed.), *Haftung des Staates für rechtswidriges Verhalten seiner Organe: Länderberichte und Rechtsvergleichung; Internationales Kolloquium veranstaltet vom Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, 1964* (Köln, Carl Heymanns Verlag KG, 1967), p. 326.

¹³⁶⁴ *Conclusions Avocat Général Velu in Cass. (1^{re} ch.), 19 déc. 1991, De Keyser, supra note 232*, p. 145.

¹³⁶⁵ *Conclusions Avocat Général Velu in Ibid*, p. 151.

According to Velu, all the aforementioned arguments countered the idea of a general immunity of the State. However, there were nevertheless two fundamental arguments with respect to State liability, which in the eyes of Velu justified certain limitations to the application of Articles 1382 and 1383 *Code Civil*. The first argument revolved around social considerations of legal certainty and the idea of a settled legal order in which each case had a definite ending. The Advocate General, however, strongly disputed the far-reaching assumption that even though State liability claims were not entirely excluded on the basis of *res judicata*, they technically still resulted in an indirect process of review of the contested decision. While acknowledging the importance of the principle of legal certainty, Velu did not subscribe to the view that it would pose a danger to the general coherence of the legal system if the competent court were allowed to challenge indirectly the presumption that the contentious judgment had been correct.

A second limitation to the wide application of Articles 1382 and 1383 *Code Civil* was, according to Velu, justified in case the individual had somehow contributed to the damage. Not only would that warrant a reduced amount of compensation for the individual, but it would even give good reason for making no award of compensation at all. This was the case whenever the individual could have avoided the damage entirely or at least could have received reparation for harm, if he/she had appealed the judgment. In fact, an individual who erroneously missed out on lodging an appeal against a judicial decision which has caused him harm, cannot hold the State liable for the damage that he/she had to incur as a result. In short, no compensation should be awarded for damage that could have been avoided if it were not for the individual's own negligence.¹³⁶⁶ Accordingly, this rule confirmed the general principle that a State

¹³⁶⁶ Opinion, Advocate General Velu, Ibid, p. 151: “[L]’action en responsabilité dirigée contre l’État doit être rejetée lorsque la partie se prétendant lésée n’a pas au préalable épuisé toutes les voies de recours internes adéquates pour éviter ou réparer le dommage.” However, in this context it is rather important to highlight the fact that the requirement of exhaustion of local remedies does not apply if the fault originated from a judicial act in the wide sense of the word. On this aspect see *Bruxelles* (2^e chambre), *Etat belge [ministère de la Justice] c/ Putzeis*, 16 décembre 1999, JT, 2000, p. 334: “L’exception tirée de l’absence d’épuisement des voies de recours ne peut être opposée lorsque la faute alléguée est étrangère à l’accomplissement d’un acte juridictionnel.” On the question of the ambit of possible remedies that are to be taken into account by an individual in order to comply with the requirement of exhaustion of local remedies see *Bruxelles* (2^e ch.), *Etat belge [ministre de la Justice] c/ G..., T...et I...* 14 janvier 2000, JT, 2000, p. 335.

liability claim against a judicial decision on the basis of Articles 1382 and 1383 of the Belgian Civil Code had to be rejected when the individual did not previously exhaust all local remedies.¹³⁶⁷ In view of these considerations, Velu concluded that the principle of *res judicata* and all connected principles, such as the primary use of remedies, still did not provide a sufficient argument for upholding an all-embracing immunity of the State. However, according to Velu, these arguments nevertheless provided a justification for the fact that the State's liability and the application of Articles 1382 and 1383 *Code Civil* in this context had to be restricted.

iii) *La théorie de l'organe*

A third argument, which was commonly raised against the introduction of a general principle of State liability for judicial breaches was based on the reasoning that one could not hold the State liable for an erroneous act, for which not even the responsible organ was liable. In other words, the State should be able to benefit from the impunity which had been accorded to one of its organs. Velu, however, also opposed this theory stating that it did not seem logical that the State would automatically benefit from the quasi-immunity, which the legislature had accorded to single judges. Accordingly, Velu argued that despite the validity of this theory, at times the dissociation of the liability of the State and the liability of one of its organs was fully justified and necessary. Subsequently, Velu outlined three different case-scenarios in which a dissociation of the liability of the State and its organ had to be applied.¹³⁶⁸ First, the State's liability was not necessarily excluded if its organ could not be held liable because the perpetrator responsible for the harmful act could not be identified among all the State organs.¹³⁶⁹ Secondly, the State could be held liable even if the organ was protected from liability on special grounds of justification, such as in case of damage that arose from an invincible mistake due to an act of God (*'la force majeure'*).¹³⁷⁰ Last but not least, the State's liability was not automatically excluded

¹³⁶⁷ On contributory negligence see *Brux.*, 14 janv. 2000, *Etat belge*, *supra* note 1367, pp. 307-309.

¹³⁶⁸ *Cass. (I^{re} ch.)*, 19 déc. 1991, *De Keyser*, *supra* note 232, pp. 148 *et seq.*

¹³⁶⁹ See *Cass.*, 5 nov. 1920, *Flandria*, *supra* note 1180, p. 193.

¹³⁷⁰ The notion of *force majeure* has been defined in a judgment of the *Cour de Cassation* on 15 May 1930 (*Cass.*, 15 mai 1930, *supra* note 1338, p. 223). See FN 1338.

whenever the organ had explicitly been exempted by law from any type of liability proceedings.¹³⁷¹ Therefore, Velu concluded that despite the application of the '*théorie de l'organe*' in this case, the State should be liable for the fault committed by its organs.

In sum, the general rule concerning State liability for judicial breaches in Belgium is the following. The State can be held liable on the basis of Articles 1382 and 1383 *Code Civil* for harm incurred by a judge or a public officer, who is working under the auspices of the judiciary. However, the State's liability only applies to instances when the judge or public officer has acted within the limits of his/her legal powers or whenever any reasonable and diligent person would consider those acts to lie within such ambit. Nevertheless, and it is here where the first serious limitation comes into play, if the act is a judicial act in the narrow sense of the word, an application for damages is only permissible if the respective legal act has been annulled, withdrawn or amended for breach of a legal rule and if it has been replaced by another decision, which has itself already acquired the status of *res judicata*. It is therefore a prerequisite that the contended judicial act has lost its status of *res judicata* in the course of the proceedings.¹³⁷²

As stated before, already in 1985 in his contribution to the XVth Colloquy on European Law in Bordeaux, Advocate General Velu had delivered an outline of the – in his view – essential elements governing public liability for judicial acts.¹³⁷³ A few years later a similar attitude was expressed by Dony in this context, when she praised the legal framework in Belgium as respecting the coherence of the judicial system and the pre-established structure of appeals.¹³⁷⁴ Furthermore, also Van Compernelle and

¹³⁷¹ For such legal exemption see Article 114 *Code Judiciaire*. Cass. (I^{re} ch.), 19 déc. 1991, *De Keyser*, *supra* note 232, p. 148.

¹³⁷² This principle was also advocated by the *Projet de recommandation relatif à la responsabilité publique pour les actes juridictionnels par le Comité d'experts au droit administratif du Conseil de l'Europe* (Doc. Conseil de l'Europe, C.D.C.J. (83) 5) and subsequently, the same proposal was launched in the course of the *Proceedings of the XVth Colloquy on European Law: Judicial Power and Public Liability for Judicial Acts, 17-19 June 1985* (Bordeaux, Council of Europe, 1986).

¹³⁷³ VELU, "Essential Elements...", *supra* note 165, pp. 77-116.

¹³⁷⁴ DONY, "La Responsabilité de l'Etat...", *supra* note 1327, p. 382: "[l]orsque l'acte incriminé consiste en une décision judiciaire, il faut préserver la cohérence du système judiciaire qui interdit la

Closset stated unequivocally that the principle of *res judicata* deserved utmost protection and therefore required that:

*[d]ans les cas précis des actes juridictionnels, pour préserver le principe selon lequel l'autorité de la chose jugée ne peut être remis en cause que par l'exercice des voies de recours, on pourrait exiger que l'action en responsabilité et en réparation ne puisse être engagée qu'après le retrait, la réformation ou l'annulation dans le cadre d'un recours, de la décision incriminée.*¹³⁷⁵

In other words, through the process of annulment, withdrawal or amendment, a decision or judgment which constitutes the source of harm will lose its authority of *res judicata*. Subsequent to the annulment or withdrawal of the impugned decision, the damages claim will appear as a logical consequence. While the annulment, withdrawal or amendment of a judgment immediately prevents harm from continuing, it is, however, not certain that the victim will in fact be compensated for the damage he/she has sustained until that point. In this case, only a damages claim would ensure full compensation.¹³⁷⁶ An additional prerequisite for the damages claim is, however, that the decision of annulment, withdrawal or amendment has already acquired the authority of *res judicata*. This way the coherence of the legal system in Belgium is preserved. But for Velu, what remains paradoxical in this context is that it really is in final decisions, when it is no longer possible to appeal a judgment, that the possibility of bringing a State liability claim appears to be most justified for the individual. By contrast, this remedy for the harmed individual seems less warranted once the judicial decision that has caused the damage has been withdrawn, annulled or amended.¹³⁷⁷

remise en cause des décisions judiciaires par d'autres voies de recours que les recours instaurés par la loi. Dès lors, la décision génératrice du dommage devrait avoir été retirée, annulée ou réformée préalablement à l'action en responsabilité."

¹³⁷⁵ COMPERNOLLE and CLOSSET-MARCHAL, "La responsabilité...", *supra* note 866, p. 435.

¹³⁷⁶ Opinion Advocate General Velu in Cass. (1^{re} ch.), 19 déc. 1991, *De Keyser*, *supra* note 232, p. 146.

¹³⁷⁷ *Ibid.*

A regime of State liability for the malfunctioning of the judiciary is necessarily a compromise between contradicting claims. With respect to all the rights and legitimate interests of the individuals harmed by a judicial decision, when establishing a regime of State liability for judicial breaches under national law, it is also necessary to protect the overall coherence of the system, which could be endangered if erroneous judgments of various jurisdictions were indirectly reviewed by lower instance courts in the course of public liability proceedings. Nevertheless, Velu did not completely endorse the principle that State liability could only be invoked against a judgment which had been withdrawn, amended or annulled. In certain instances, compensation was to be awarded even if the aforementioned conditions were not fulfilled. This is the case, for example, whenever a judicial decision has the effect of depriving an individual of his freedom contrary to the obligations arising under Article 5 ECHR.¹³⁷⁸

iv) The notion of fault

With respect to the notion of *fault* as applied to the judicial power, Velu outlined in his final observations that under Articles 1382 and 1383 *Code Civil* fault was dependent on two aspects. First, fault could emerge in the form of an '*erreur de conduite*', which was to be evaluated according to the expected standards of conduct when compared to the standard of a careful and circumspect judge in exactly the same situation.¹³⁷⁹ The judge's error of conduct also had to manifest itself *in concreto* and not *in abstracto*. Furthermore, it had to involve imprudence or negligence on the part of the judge, the degree of which went beyond of what could be tolerated in the particular context and under the specific circumstances of the case.¹³⁸⁰

Secondly, fault has been committed whenever a judge violated a directly applicable rule of law, which ordered him/her to act or refrain from acting in a certain way. Accordingly, the second category of fault consisted of simple breaches of law by

¹³⁷⁸ Cass. (*I^{re} ch.*), 19 déc. 1991, *De Keyser*, *supra* note 232, p. 146.

¹³⁷⁹ "[M]agistrat normalement soigneux et prudent".

¹³⁸⁰ On the notion of fault see, *inter alia*, *Brux.*, 14 janv. 2000, *Etat belge*, *supra* note 1367, pp. 221 and *Civ. Brux.*, 17 sept. 2003, *C...*, *supra* note 1344, p. 222.

the judiciary. This was of course only applicable under the condition that there was no legitimate justification for the court's action, such as the occurrence of an *erreur invincible* or *force majeure*.¹³⁸¹ In his observations on the *De Keyser* case, Advocate General Velu provided an astute definition of such fault when he stated that

*[...] en principe, pour l'application des articles 1382 et 1383 du Code civil, constitue, en soi, une faute, indépendamment de toute considération d'imprudence ou de négligence, la violation par une autorité d'une norme lui imposant de s'abstenir ou d'agir de manière déterminée établie par le droit national ou par un traité international ayant des effets directs dans l'ordre juridique interne.*¹³⁸²

Overall, the definition of fault as formulated by the Advocate General in *De Keyser* acquired general validity and was later echoed in the famous *Anca* judgment by the *Cour de Cassation* on 8 December 1994.¹³⁸³

Even though only a minor point in his analysis, another important element was brought to the fore by Velu, namely the wish to protect the integrity of the judicial hierarchy. The issue reflects the concern that according to national procedural rules, the judge competent to deal with the public liability claim might be faced with the task of having to review, even if only in an indirect matter, a judgment that had been previously made by a higher court within the same hierarchical line of courts. Hence, a disturbance of the judiciary's established system of precedent through a public liability claim was and remains a common concern in this context and was in fact also

¹³⁸¹ For a detailed definition of fault, which is applied in this context, see Opinion of Advocate General Velu in the case *Cour de Cassation (1^{re} chambre), Société anonyme des charbonnages de Gosson-Kessales, en liquidation, c/ Commune de Seraing-sur-Meuse et État belge, Ministre de l'intérieur*, 13 mai 1982, *Pas.* 1982, I, pp. 1056-1086. In this case as in his Opinion in the *De Keyser* case, Velu speaks of the difficulties in determining the exact relation between fault and illegality. The courts and the doctrine in Belgium are divided on this question.

¹³⁸² On the definition of fault see also, for example, *Bruxelles (2^e chambre), Decamp c. Etat belge [ministre de la Justice]*, 8 décembre 1999, *JT*, 2000, p. 339: "[...] que la faute suppose en outre l'application erronée d'une norme juridique établie, c'est-à-dire, d'une norme connue au moment où l'acte juridictionnel incriminé a été accompli et que l'erreur du magistrat puisse être considérée comme injustifiable eu égard à tous les éléments dont il disposait et notamment de l'état indiscutable de la doctrine et de la jurisprudence à ce moment-là."

¹³⁸³ *Cass. (1^{re} ch.)*, 8 déc. 1994, *Anca*, *supra* note 1324, pp. 497-498.

raised by various governments in the *Köbler* case.¹³⁸⁴ It is in an attempt to dispute those concerns that Velu's arguments may have some leverage, even though at the time the Advocate General refused to place much importance on this procedural objection. In fact, Velu simply argued that there was no general principle under Belgian law prohibiting such a situation.¹³⁸⁵ Velu underlined further that it had never been contested until then that a court of first instance was generally competent to rule on a liability claim for harm incurred by a judge, even if that judge belonged to a hierarchically superior court. Moreover, under Belgian law even the dismissal of a specific judge and the classification of his/her behaviour in the process were, according to Articles 828 to 847 *Code Judiciaire*, conferred upon the court to which the judge belonged.

In addition to the aforementioned examples, according to Articles 479 to 503 *Code d'instruction criminelle* and Article 4 *de la loi du 17 avril 1878 contenant le titre préliminaire du Code de Procédure Pénale*, it was clear that in case a judge committed a crime¹³⁸⁶ outside or during his or her judicial functions, the *Cour d'Appel* would be competent to rule on related civil and public liability claims. This rule was applied not only with respect judges who belonged to the same jurisdiction, such as the *Cour d'Appel* or *Cour du Travail*, but also concerning judges who sat on the higher courts such as the *Cour de Cassation*, the *Cour d'Arbitrage* or the *Conseil d'État*.¹³⁸⁷

The same holds true for Article 27 of the Law of 13 March 1973 concerning the compensation to be awarded to a victim of unjustified detention in violation of Article 5 ECHR.¹³⁸⁸ The law explicitly stipulates that in such a situation the general competence to deal with liability claims against the State lies with the *juridictions ordinaires*. However, the law does not include a separate restriction requiring that the

¹³⁸⁴ C-224/01, *Köbler*, *supra* note 1, paras. 1 *et seq.*

¹³⁸⁵ *Cass. (1^{re} ch.)*, 19 déc. 1991, *De Keyser*, *supra* note 232, p. 150. Thereby, Velu referred specifically to the absence of any such provisions in the *Code Judiciaire* or the *Code d'instruction criminelle*.

¹³⁸⁶ Full-text access to Belgian legislation is available at: www.ejustice.just.fgov.be/loi/loi.htm.

¹³⁸⁷ *Cass. (1^{re} ch.)*, 19 déc. 1991, *De Keyser*, *supra* note 232, p. 150, FN 72 et FN 73.

¹³⁸⁸ See chapter VI, p. 339.

evaluation of the judge's act can only be carried out by a judge of equal or higher rank. Over and above the situation under domestic law, the Advocate General reached out beyond the Belgian borders to the regulations under German and Italian law to the position in German and Italian law on the matter and concluded that even under foreign jurisdictions the framework of State liability for judicial breaches had generally been attributed to the ordinary judiciary. The rules of competence, however, have also been set out without including any objections to the fact that the judge, as the perpetrator of the damage, might be "evaluated" by judges of the same or even a lower instance.¹³⁸⁹ In line with the Advocate General's opinion, the *Cour de Cassation* finally concluded, contrary to the CJEU's *Köbler* ruling, that

*dans ces limites la responsabilité de l'Etat du chef d'un acte dommageable du pouvoir judiciaire n'est ni contraire à des dispositions constitutionnelles ou légales, ni inconciliable avec les principes de la séparation des pouvoirs et de l'autorité de la chose jugée; qu'elle n'est incompatible non plus avec l'indépendance du pouvoir judiciaire et des magistrats qui le composent, [...].*¹³⁹⁰

It was, however, only later that the *Cour de Cassation* announced in its case-law the precise conditions necessary for invoking the responsibility of the State for damage incurred by a judicial act.¹³⁹¹

¹³⁸⁹ In this context Velu specifically refers to the German law of 26 June 1981 (Article 18 para. 1) and the corresponding Italian regulation in Article 4 of the Law of 13 April 1988, which both allow for such a constellation to occur. In its Article 34 the German *Grundgesetz* even forbids to alter the designated competence of ordinary courts in these matters. Even in France and Luxembourg, the law does not explicitly object to this possibility. In France the competence lies with the *Tribunal de Grande Instance* and that even if the judicial breach has been committed by a higher jurisdiction. See *Cass. (1^{re} ch.)*, 19 déc. 1991, *De Keyser*, *supra* note 232, p. 151, FN 74.

¹³⁹⁰ *Ibid*, p. 152.

¹³⁹¹ See following discussion of the Court's case-law.

d) Cour de Cassation: Arrêt du 8 décembre 1994

i) *From the decision in the De Keyser case to the ruling in Anca*

Immediately after the *Cour de Cassation*'s annulment of the initial judgment in *De Keyser*, the case was remitted for decision to the *Cour d'Appel* of Liège.¹³⁹² At this point, one might have logically concluded from the previous decisions in the case that the judgment in the first instance must have contained a finding of a violation of national law or of an international legal norm with direct effect in the internal legal order. The Court of Liège, however, did not immediately confirm such a violation, but instead first chose to examine first the alleged misconduct of the responsible judge. In the course of the Court's deliberations, however, the conceptual difference between the two definitions of fault became increasingly blurred. The Court announced that the alleged error of the responsible judge had to be evaluated in light of the standards of conduct applied to any diligent and prudent judge facing the same situation. Thereby, the central question was whether an official declaration of bankruptcy automatically gave rise to a duty to perform a preliminary audit. Since the effective legal regulations in Belgium were silent on this particular issue, the question remained unresolved.

After a thorough investigation, the *Cour d'Appel de Liège* concluded in its judgment of 28 January 1993 that considering all the circumstances of the case, the *Tribunal de Commerce* of Brussels had in its ruling merely taken a position with respect to a disputed legal question. Hence, the *Cour d'Appel* concluded that the judiciary had committed an excusable error.¹³⁹³ Accordingly, the Court acquitted the responsible judge of any fault.¹³⁹⁴ As a result, the State was not to be held responsible for the detrimental consequences suffered by the applicant following the declaration by the *Tribunal de Commerce de Bruxelles* of the company's insolvency. In the Court's wording, the excusability of the judicial act was justified by the fact that in

¹³⁹² *Cour d'Appel de Liège*, 28 janvier 1993, JT, 1993, pp. 477 et seq.

¹³⁹³ Ibid.

¹³⁹⁴ Ibid.

Belgium the legal framework regulating insolvency proceedings was still equivocal, ambiguous and therefore rather controversial. Under such conditions and notwithstanding the annulment of the initial judgment by the *Cour de Cassation*, the *Cour d'Appel de Liège* acquitted the *Tribunal de Commerce de Bruxelles* of any fault.¹³⁹⁵

Subsequently, a new complaint was lodged by the applicants with the *Cour de Cassation*.¹³⁹⁶ The liquidators of the company launched a claim arguing that the decision by the *Tribunal de Commerce* of Brussels had already been overturned on appeal on the grounds that *Anca*'s insolvency had been declared in violation of the applicant's rights of defence. However, in its ruling of 8 December 1994, the *Cour de Cassation* dismissed the applicant's arguments and finally rejected the application to revise the ruling which had been pronounced by the *Cour d'Appel de Liège*. In its reasoning, the Court stated that at the time the legal question of whether to perform a preliminary audit before an *ex officio* declaration of insolvency had in fact been a disputed and controversial legal issue. The Court went on to argue that in light of such an unresolved legal situation, the *Cour d'Appel de Liège* rightfully acquitted the judges at the *Tribunal de Commerce*, who had declared *Anca*'s insolvency without having undertaken a previous audit, of any faulty behaviour.¹³⁹⁷ Generally speaking, the *Cour de Cassation* rejected the suggestion that in cases of State liability for judicial errors any breach of law resulting in the alteration of a judgment would classify as fault.¹³⁹⁸ Such a position had in fact been supported by the Advocate General in the case, Roger Dalcq, who considered that the judge's general obligation to apply the rules of law was to be interpreted in the narrowest possible manner.¹³⁹⁹

¹³⁹⁵ DONY, "Le Droit Belge," *supra* note 1178, p. 168.

¹³⁹⁶ See also COMPERNOLLE, "Considérations sur la responsabilité...", *supra* note 1033, p. 53.

¹³⁹⁷ Cass. (1^{re} ch.), 8 déc. 1994, *Anca*, *supra* note 1324, p. 497.

¹³⁹⁸ DONY, "Le Droit Belge," *supra* note 1179, pp. 168 *et seq.*

¹³⁹⁹ R. Dalcq, JT 1992.452. According to Dalcq's definition each time "[...] qu'il résultera de la décision retirant, annulant, réformant ou rétractant le jugement qui a causé le dommage, qu'il y a eu violation d'une norme juridique établie, la faute sera ipso facto établie."

In his contribution on the subject, Compernelle endorsed the approach of the *Cour de Cassation* on this question.¹⁴⁰⁰ He welcomed the fact that the Supreme Court had rejected such generalist approach regarding the definition of fault and also pointed out that the interpretation of a rule of law could at times be a rather delicate task, especially if the question at stake was so controversial. With such a broad definition of fault, Compernelle concluded, an individual would even be able to raise a claim against a judge following his/her interpretation of a rule of law for the sole reason that a higher court did not share the same interpretation. To avoid such development, the possibilities of basing a liability claim against the State upon a fault committed by a judge had to stay within reasonable limits, which at the same time should also take into account the special status of the judiciary. Compernelle then echoed the opinion also expressed by the *Cour de Cassation* in *Anca*, namely that a judicial act evoking State liability must correspond to an erroneous act, which no other diligent and prudent judge placed in the same situation at the relevant point in time would have committed.¹⁴⁰¹ This, in fact, is a formulation which we have already encountered in the observations of Advocate General Velu in the *De Keyser* case.¹⁴⁰² In sum, the State responsibility regime for erroneous acts committed by the judiciary strongly resembles the general regime of (civil) liability.¹⁴⁰³

Even though the second attempt to challenge the judgment issued by the *Cour d'Appel de Liège* had been rejected by the *Cour de Cassation*, the Court nevertheless used the opportunity to clarify some of the principles it had already partly addressed in the *De Keyser* ruling. In fact, this final judgment of the *Cour de Cassation* offered a comprehensive overview of the notion of fault in cases where judicial conduct had been at the centre of the State liability proceedings. Accordingly, the Court premised its analysis on two different hypotheses, which were to clarify the definition of 'fault'. Consistent with the definition of fault advanced by Advocate General Velu in the *De Keyser* case, the Court declared in *Anca* that

¹⁴⁰⁰ COMPERNOLLE, "Considérations sur la responsabilité...", *supra* note 1033, p. 54.

¹⁴⁰¹ VAN GERVEN *et al.*, *Tort Law*, *supra* note 238, p. 388.

¹⁴⁰² Advocate General Velu, *Conclusions*, Cass. (1^{re} ch.), 19 déc. 1991, *De Keyser*, *supra* note 232, p. 149.

¹⁴⁰³ COMPERNOLLE, "Considérations sur la responsabilité...", *supra* note 1033, p. 54.

*la faute du magistrat pouvant, sur la base des articles 1382 et 1383 du Code civil, entraîner la responsabilité de l'État consiste, en règle, en un comportement qui, ou bien s'analyse **en une erreur de conduite** devant être appréciée suivant le critère du magistrat normalement soigneux et prudent, placé dans les mêmes conditions, ou bien, sous réserve d'une erreur invincible ou d'une autre cause de justification, **viole une norme du droit national ou d'un traité international ayant des effets directs dans l'ordre juridique interne, imposant au magistrat de s'abstenir ou d'agir de manière déterminée.***¹⁴⁰⁴

In this passage, the *Cour de Cassation* generally distinguished between an error of conduct on the one hand, and a violation of a legal norm, which required the judge to act or react in a specific manner, on the other. The latter could also arise from the violation of an international treaty having direct effect in the internal legal order.¹⁴⁰⁵ Crucial to the affirmation of the first hypothesis was that the judge's misconduct had to be assessed in relation to the conduct of a "normally careful and circumspect judge placed in the same circumstances at the relevant point in time".¹⁴⁰⁶ Hypothesis two, on the contrary, which dealt with the violation of a legal provision, was to be seen entirely separate from the judge's behaviour itself. What was decisive in this second case was merely the factual and objective assessment of whether or not the judge had violated a rule of law. After all, as the Advocate General had phrased it in his observations on the case, the judge's adherence to the established legal order was a result-oriented duty rather than an obligation to use the correct tools and the right attitude in the decision-making process.¹⁴⁰⁷ Finally, on a more general note, the Court reiterated its dictum in *De Keyser* that it was an indispensable precondition for any liability claim based on an alleged violation of an established legal norm that the judicial act in question had previously been withdrawn, amended, annulled or

¹⁴⁰⁴ Cass. (1^{re} ch.), 8 déc. 1994, *Anca*, *supra* note 1324, p. 497 (emphasis added).

¹⁴⁰⁵ See also analysis of the case in DONY, "Le Droit Belge," *supra* note 1178, pp. 168 *et seq.*

¹⁴⁰⁶ Cass. (1^{re} ch.), 8 déc. 1994, *Anca*, *supra* note 1324, p. 497. English translation as in VAN GERVEN *et al.*, *Tort Law*, *supra* note 238, p. 388.

¹⁴⁰⁷ Cass. (1^{re} ch.), 8 déc. 1994, *Anca*, *supra* note 1324, *Observations*, R. O. Dalcq, p. 497: "[...] appliquer la norme juridique de manière correcte est une obligation de résultat pour le magistrat et non une obligation de moyen."

retracted by a final judicial decision. In short, it was crucial that the contended judicial act was no longer *res judicata*.¹⁴⁰⁸

ii) *The Opinion of Advocate General Roger Dalcq*

Advocate General Dalcq interpreted the Court's judgment in *Anca* as an unfortunate restraint on the wide implications and the broad scope of actions that had initially been opened up by the Court's earlier *De Keyser* ruling in 1991.¹⁴⁰⁹ In his observations on the case, Dalcq openly criticised the approach taken in the judgment of the *Cour de Liège*, which was later confirmed on appeal by the *Cour de Cassation*. Dalcq argued that notwithstanding the clear definition of what constituted a judicial breach in *De Keyser*, the Court of Appeal had apparently failed to apply those guidelines correctly to the *Anca* case. Therein, in Dalcq's view, the Court's opinion stood in stark contrast to the two previously outlined hypotheses, which classified the notion of fault as either an instance when a judge had committed an error of conduct, which was to be evaluated in light of a "normally careful and circumspect judge placed in the same circumstances at the relevant point in time",¹⁴¹⁰ or a case when a judge had simply violated a valid legal norm. As the Advocate General pointed out in his observations, the first option would only be applicable in truly exceptional cases. After all, a judge's conduct within the ambit of his/her judicial activity was almost always going to be based on a legal norm. Consequently, most judicial breaches would automatically fall under the second hypothesis.¹⁴¹¹

However, in the case at hand, Dalcq criticised the view that the judge's simple breach of a rule of law had been subjected to a behavioural assessment with respect to conduct of a normally careful and circumspect judge. The Court of Appeal had only taken into account the first hypothesis, the error of conduct, despite the fact that the

¹⁴⁰⁸ Ibid, p. 497: "Lorsque l'acte incriminé constitue l'objet direct de la fonction juridictionnelle, la responsabilité de l'Etat ne peut être encourue que si l'acte litigieux a été retiré, réformé, annulé ou rétracté par une décision passée en force de chose jugée en raison de la violation d'une norme juridique établie."

¹⁴⁰⁹ Ibid, p. 497.

¹⁴¹⁰ Ibid, p. 497. English translation as in VAN GERVEN *et al.*, *Tort Law*, *supra* note 238, p. 388.

¹⁴¹¹ Cass. (1^{re} ch.), 8 déc. 1994, *Anca*, *supra* note 1324, *Observations*, R. O. Dalcq, pp. 497-498.

previous judgment by the *Cour de Cassation* had obviously been annulled on the grounds of a violation of the claimant's rights of defence as stipulated in Article 6 of the ECHR.¹⁴¹² Faced with a doubly stringent set of requirements to establish a judge's fault, it was rather predictable that the Court was going to decide against the applicant's claim for compensation. According to Dalcq, it was rather surprising that on appeal the *Cour de Cassation* upheld the decision taken in the second instance by the *Cour de Liège*.¹⁴¹³

Seen from a different angle, the judgment by the *Cour de Liège* attesting to an absence of fault might nevertheless have nevertheless been justified. After all, the *Cour de Cassation* had spelled out very clearly in the initial *De Keyser* ruling of 1991 that on the grounds of a breach of a well-established legal norm, the claim for compensation could only be entertained if the act under review had been previously withdrawn, amended, annulled or retracted by a final decision.¹⁴¹⁴ With due regard to this rule it remains questionable whether at the time when the company *Anca* was declared insolvent, the legal norms on the individual's rights of defence in the course of insolvency proceedings truly shared the characteristic of a well-established legal norm.¹⁴¹⁵

Generally speaking, it is remarkable to observe that based on the core principles of civil liability, the framework of State liability for judicial breaches in Belgium has been gradually built up in the courts' case-law. In this sense the two key decisions of *De Keyser* and *Anca* provide vivid proof of the creative force of the judges in Belgium. However, it is also incontestable, for want of a systemic and holistic

¹⁴¹² DONY, "Le Droit Belge," *supra* note 1178, p. 169.

¹⁴¹³ In fact, the *Cour d'Appel de Liège* had ruled on 28 January 1993 that "l'annulation du jugement de faillite est une condition nécessaire mais non suffisante à l'admission d'une éventuelle responsabilité du défendeur; que la faute doit s'apprécier in concreto suivant le critère du magistrat normalement soigneux et prudent, placé dans les mêmes conditions et circonstances de temps; que la faute suppose encore l'application erronée d'une norme juridique établie, c'est-à-dire d'une norme connue au moment où l'acte juridictionnel incriminé est intervenu et que l'erreur du magistrat puisse être considérée comme évidemment impardonnable eu égard à tous les éléments dont il disposait et notamment à l'état indiscutable de la jurisprudence à ce moment-là," *CA Liège*, 28 janv. 1993, *supra* note 1392, pp. 477 et seq.

¹⁴¹⁴ See *Cass. (1^{re} ch.)*, 19 déc. 1991, *De Keyser*, *supra* note 232, p. 152.

¹⁴¹⁵ DONY, "Le Droit Belge," *supra* note 1178, p. 169.

approach to the issue, which could have been provided by the legislature, the gradual development of the liability regime for judicial breaches in the jurisprudence triggered a number of lacunas and unresolved problems in this area.¹⁴¹⁶ Moreover, the archaic provisions on the procedure of '*la prise à partie*' in the *Code Judiciaire*, which are still in force today, prevent the State from instituting recursory actions against individual judges following the State's liability in such cases.¹⁴¹⁷ At this level, a legislative reform initiative by the legislature might be beneficial in order to smoothen out the system. Overall, new rules would, however, only need to introduce minor adjustments to a functioning and sophisticated system of State liability for judicial breaches, which has essentially already been established in an almost conclusive manner by the jurisprudence in Belgium.

3. State responsibility based on a violation of Community law

For Belgium, our prototype representing the fourth category in our system of classification, the principle of national procedural autonomy constitutes the direct link between the concept of Member State liability as established in the CJEU's jurisprudence on the one hand, and the direct ramifications of this Community right on the national State liability regimes on the other. Already in the *Francovich* ruling the Court had insisted:

it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law.¹⁴¹⁸

¹⁴¹⁶ As outlined in DONY, "*La Responsabilité de l'Etat...*," *supra* note 1327, pp. 363 *et seq.*, there are a number of existing gaps in the Belgian system of State liability and reparation for judicial breaches. This has been confirmed by SOHIER, "*Responsabilité sans faute...*," *supra* note 1218, p. 383.

¹⁴¹⁷ Articles 1140-1147 *Code Judiciaire*.

¹⁴¹⁸ C-6 & 9/90, *Francovich*, *supra* note 2, para. 42.

Therefore, relying on the national procedural framework of each Member State, the Community “was not intended to create new remedies in the national courts [...] other than those already laid down by national law.”¹⁴¹⁹

Under the scrutiny of the guiding principles of effectiveness and equivalence, the national procedural framework in all the different Member States forms the crucial building block, through which an individual may secure his/her Community right. In order to safeguard the effective protection of the individual’s Community rights, which also include the right to compensation after he/she has been harmed by a breach of EC law, the national procedural structures should in theory constantly adjust to the developments on the Community level. After all, when talking about the principle of Member State liability under EC law, we are faced with a moving target: The evolution of the jurisprudence of the Court of Justice of the EU. In short, the principle of national procedural autonomy constitutes the backbone of effective rights protection within the Community. As in our previous three categories, we will therefore once again address the question of the extent to which in Belgium our prototype of category four, the prevailing scheme of State liability under national law has lived up to the demands and parameters required by Community law.¹⁴²⁰ The next step would then be to inquire whether the Community principle has in fact already had notable impacts or so-called ‘spill-over effects’ on the national framework of public liability. While we will address this question rather briefly for administrative and legislative breaches in Belgium, the spotlight will once again be on the past, present and future repercussions of the *Köbler* case on the public liability regime for judicial breaches in Belgium.

a) Did the *Francovich* line prior to *Köbler* already have a spill-over effect on the concept and/or the limits of State liability in Belgium?

Similar to the developments in other Member States, European Community law has had a serious impact on the hierarchy of norms in the Belgian legal system. Proof

¹⁴¹⁹ Case 158/80, *Rewe-Handelsgesellschaft*, *supra* note 143, pt. 6.

¹⁴²⁰ A similar analysis has been undertaken by PARDON and DALCQ, “La responsabilité...,” *supra* note 1243, p. 201.

of such had already been provided as early as 1965 when the CJEU proclaimed the fundamental principle of primacy of EC law in the groundbreaking *Costa v. ENEL* ruling.¹⁴²¹ Abiding to the dictum imposed by Community law, the Belgian *Cour de Cassation* subsequently handed down a landmark judgment on 27 May 1971, in which it fully acknowledged the pre-eminence of international as well as European Community law over national law in Belgium.¹⁴²² According to the Court's reasoning, it was the special nature of international law and the specificity of the Community legal order that justified their primacy over national law.¹⁴²³

In case of a breach of EC law by the Belgian executive or the judiciary, this violation mostly seems to correspond to the violation of a national legal obligation by either one of those two branches of the State. The liability proceedings against the State are handled accordingly. When it comes to breaches of Community law by the legislative power, however, the only suitable procedural path provided under Belgian law would be the remedial framework of State liability based on fault. Even though it might pose some difficulties, it still constitutes the only feasible option available under the current procedural framework in Belgium. The procedure of '*le contentieux de l'indemnité*' disqualifies itself for the simple reason that under this framework it remains impossible to claim compensation for damage caused by the national legislature.¹⁴²⁴

¹⁴²¹ As the Court stated on p. 1160 of the judgment: "*Issu d'une source autonome, le droit né du Traité ne pourrait [...] se voir judiciairement opposer un texte interne quel qu'il soit, sans perdre son caractère communautaire et sans que soit mise en cause la base juridique de la Communauté elle-même.*" Case 6/64, *Costa v. ENEL*, *supra* note 396, p. 1160.

¹⁴²² *Cour de Cassation, État belge, Ministère des Affaires économiques c. S.A. Fromagerie franco-suisse Le ski*, 27 mai 1971, *Pas.*, 1971, I, pp. 886 *et seq.* In this context see also comments by PARDON and DALCQ, "La responsabilité....," *supra* note 1243, pp. 193 *et seq.*

¹⁴²³ On the status of international law and European Community law within the Belgian legal order see amongst others JEAN-VICTOR LOUIS, "La primauté du droit international et du droit communautaire après l'arrêt 'Le Ski'" *Mélanges Fernand Dehousse, Vol. II* (Bruxelles, Editions Labor, 1979), pp. 235 *et seq.*

¹⁴²⁴ See discussion of '*le contentieux de l'indemnité*' in section I.1.b of this chapter. Also in DONY, "Le Droit Belge," *supra* note 1178, pp. 164 *et seq.*

i) Breaches of Community law committed by the administrative authorities

The question of State liability for breaches of EC law by the administrative authorities did not receive much attention in the literature; those authors who have expressed themselves on this very aspect have had no hesitation to qualify such violation of EC law as an illegal public act based on fault. In this sense and with reference to the French judgment in the case *Alivar*,¹⁴²⁵ Quertainmont noted that contrary to the French solution of applying the concept of responsibility *sans faute* when it comes to violations of Community law by the French administration “*en Belgique, par contre, on peut penser que l’illégalité résultant, en matière d’interventionnisme économique, d’une violation du traité de Rome, serait considérée comme fautive et engagerait la responsabilité quasi-délictuelle de l’Etat.*”¹⁴²⁶

The jurisprudence on this question is also scarce and rather uncontentious. The courts generally show no reluctance to invoke the responsibility of the State in case of breaches of Community law incurred by an act of the executive. In fact, already in a decision of 9 June 1966 the *Tribunal Civil de Bruxelles* had stated that an “*arrêté royal*” that had been adopted in 1961, was in breach of EC law. In this specific case the administrative act had conditioned the sale of fertilizers in Belgium upon a specific amount of azotes which had to be contained in the product. A company claimed that this administrative order was incompatible with (former) Articles 30 and following of the original EEC Treaty,¹⁴²⁷ since the provision was discriminatory with respect to imports of fertilizers from other Member States. Subsequently, the company brought a liability claim against the Belgian State claiming compensation for the losses it had suffered as a result of the “*arrêté royal*”. As confirmed in the ruling, it was within the competence of the *justice judiciaire* to judge the legality of administrative decisions.¹⁴²⁸

¹⁴²⁵ See the French *Conseil d’État*’s decision in *Alivar* of 23 March 1984 (*RTDE*, 1984, p. 341). On this case see also GEIGER, *Der gemeinschaftsrechtliche Grundsatz.*, *supra* note 82, pp. 33 *et seq.*

¹⁴²⁶ M. PHILIPPE QUERTAINMONT, “Responsabilité de l’administration dans l’octroi d’aides financières aux entreprises” *La responsabilité des pouvoirs publics* (Bruxelles, Bruylant, 1991), p. 123.

¹⁴²⁷ Now Articles 28 *et seq.* EC.

¹⁴²⁸ *Tribunal Civil de Bruxelles*, 9 juin 1966, *CDE*, 1968, p. 550.

The *Cour de Cassation* had the opportunity to comment on this issue in a judgment of 13 May 1982. Advocate General Velu had previously argued in his Opinion on the case that a violation of national law or an international legal norm with direct effects in the internal legal order automatically constituted as fault. However, the *Cour de Cassation* did not go as far as that and restricted the faulty character of administrative acts to a violation of constitutional or ordinary law, without a reference to international law.¹⁴²⁹ In a further judgment of 9 February 1990, the *Tribunal Civil de Bruxelles* had to deal with a claim by several Italian and Spanish citizens who had been excluded from the selection process for a specific job posting based on the argument that they did not have Belgian nationality.¹⁴³⁰ The Court insisted on the narrow interpretation of (former) Article 48 of the Treaty¹⁴³¹ and concluded that in the present case an exclusion of non-nationals was not justified under Community law. Furthermore, the Court explicitly speaks of a fault committed by the administration and found that the State had to compensate them for lost opportunity.

Finally, there was a decision by the *Tribunal Civil de Liège* of 21 February 1992, which confirmed the liability of the State and the payment of compensation to the claimant for breach of EC law.¹⁴³² The case dealt with an EU citizen who had been refused the right to residency in Belgium because he had not been affiliated to any social security regime there. Eventually, the Court emphasized that the State's requirement and pre-condition for settlement, which previously asked for an affiliation to a social security regime, was clearly against Community principles. Hence, the Court proclaimed that the Belgian State had to pay compensation for fault committed in the application of EC law.¹⁴³³

¹⁴²⁹ *Cass. (I^{re} ch.)*, 13 mai 1982, *supra* note 1196, pp. 1056-1086.

¹⁴³⁰ *Tribunal Civil de Bruxelles*, 9 février 1990, *JLMB*, 1990, p. 766.

¹⁴³¹ Now Article 39 EC.

¹⁴³² *Brux.*, 9 fév. 1990, *supra* note 1430, p. 766. Summary of the judgment available under http://jure.juridat.just.fgov.be/view_decision?justel=F-19900209-2&idxc_id=29913&lang=fr.

¹⁴³³ *Tribunal Civil de Liège*, 21 février 1992, *JLMB*, 1994, p. 287.

ii) Breaches of EC law committed by the legislature

Could an individual launch a State liability claim for the damage caused to him/her due to a violation of Community law by the Belgian Parliament? So far, fundamental arguments such as the absolute sovereignty of the legislature, the general incompetence of the judiciary to review national law or the absence of a procedure to test the laws' compatibility with the principles enshrined in the Constitution had always been used as a pretext to reject the idea of the State's responsibility for legislative breaches.¹⁴³⁴ However, as we have already mentioned, the situation in Belgium changed significantly when the *Cour d'Arbitrage* was awarded the competence to undertake a partial review of legislative acts to assess their compatibility with certain constitutional principles.¹⁴³⁵ As a consequence, only under the condition that the Constitutional Court declared a legislative act unconstitutional could an individual, who had been harmed by the incriminated norm, bring a liability claim against the State. Hence, under national law a claim for State liability due to shortcomings of the legislature was from then on permitted, but remained strictly tied to these conditions. After the CJEU's judgment in *Brasserie du Pêcheur*, however, it was clear that such a right also existed under Community law and that therefore, even in the absence of a similar entitlement under Belgian law, the State would have to provide a suitable remedy in order to ensure the effectiveness of the individual's Community right.¹⁴³⁶

However, as the reader might recall, with respect to fault-based violations by the legislature of European or international norms which have direct effect, the individual's right to compensation had already been established by the *Cour de Cassation* in the famous *Le ski* judgment in 1971.¹⁴³⁷ Therefore, long before the

¹⁴³⁴ In this context see LEROY, "Responsabilité des pouvoirs publics...", *supra* note 1247, pp. 303 *et seq.*

¹⁴³⁵ Judicial control extends to a compatibility test with Articles 10, 11 and 24 of the Belgian Constitution as well as those constitutional provisions regulating the division of competences between the federal State and the regions. See PARDON and DALCQ, "La responsabilité...", *supra* note 1243, p. 201.

¹⁴³⁶ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 32.

¹⁴³⁷ Cass., 27 mai 1971, *Le ski*, *supra* note 1422, pp. 886 *et seq.*

creation of the *Cour d'Arbitrage* in Belgium, the *Cour de Cassation* had already clearly rejected the application of a national law that was contrary to Community law. In this ruling the judges had neither annulled nor retracted the national law concerned, but simply declared that Community law had stripped it of its effectiveness.¹⁴³⁸ In view of the impossibility at the time of subjecting national laws to constitutional review and hence, of awarding compensation for breaches committed by the legislature under national law, the question that immediately emerged after the *Le ski* judgment was whether the courts' duty to review national law for its compatibility with international norms or EC law did not at the same time imply that the courts also had the competence to review national law regarding its compatibility with constitutional principles in Belgium.¹⁴³⁹

The doctrine in Belgium always seemed unanimously positive when it came to the question of possible State liability claims for breaches of EC law incurred by the national legislature. A repeated point of reference in this context was the Permanent Court of International Justice's ruling in the *Case concerning certain German interests in Polish Upper Silesia*, in which the Court had declared as early as 1926 that from the viewpoint of responsibility under international law legislative provisions were to be handled in the same way as judicial decisions or administrative acts.¹⁴⁴⁰

In a similar manner, Kovar had predicted at a conference in 1975 that "*l'affirmation de la primauté sur la loi du droit international et du droit*

¹⁴³⁸ On this judgment see also FAGNART, "De la légalité....," *supra* note 1183, pp. 31 *et seq.*

¹⁴³⁹ Precisely this question was raised by Advocate General Ganshof van der Meersch in his Opinion in the case *JT*, 1974, p. 566: "*On peut se demander si la doctrine de votre arrêt (du 27 mai 1971) – dont l'autorité est grande – ne devrait pas vous conduire à reconsidérer une jurisprudence qui date de 1849. [...] Cette évolution de la jurisprudence à l'égard du conflit traité-loi et l'attribution à des juridictions internationales [...] du pouvoir de relever que l'Etat belge, fut-ce même par l'acte de son pouvoir législatif ou de son pouvoir judiciaire, a manqué à son obligation de respecter une règle de droit supérieure, représente [...] des changements [...] qui [...] doivent inciter le juge à revoir l'interprétation première qu'il a donnée, dans un passé qui différerait profondément du système normatif actuel, à ses devoirs constitutionnels [...]. Refuser d'exercer le contrôle de la conformité de la loi à la Constitution, n'est-ce pas donner à la loi une force juridique supérieure à celle de la Constitution à laquelle elle est cependant subordonnée et dont elle déduit sa validité, et attribuer donc la primauté au pouvoir constitué sur le pouvoir constituant?*" The Court provided an answer to the question in a judgment of 3 May 1974. On this issue see also *Ibid*, *supra* note 1183, pp. 10 *et seq.*

¹⁴⁴⁰ Permanent Court of International Justice, 25 May 1926, *Case concerning certain German interests in Polish Upper Silesia*, Series A, n°7, p. 19.

communautaire ayant effet direct dans l'ordre juridique interne doit nécessairement s'accompagner d'une évolution parallèle sur le plan de la responsabilité de l'État législateur". Furthermore, he requested open access to national remedies for individuals who have been harmed as a result of a breach of EC law.¹⁴⁴¹ Likewise, the conclusion of Andersen's well-known report on the topic was that the legislature was no longer protected by its veil of immunity when it came to questions of conformity with the EC treaty.¹⁴⁴² The crucial question in Anderson's work was

[p]ourquoi ne pourrait-on pas considérer qu'en prenant une loi, qui porte atteinte aux droits subjectifs que les citoyens puisent directement dans le traité, le législateur a commis une faute, mettant ainsi en cause sa responsabilité sur pied des articles 1382 et 1383 du code civil?

He argued that the solution, which had been applied in the *Le ski* case, could easily be extended to legislative breaches of national law.

In an article entitled "*La responsabilité du législateur en raison de la méconnaissance de normes supérieures de droit international*"¹⁴⁴³ Simonart confirmed that:

l'obligation d'effacer les conséquences d'actes contraires au droit communautaire [...] doit revêtir, semble-t-il, un caractère général et paraît devoir s'étendre à toute forme de réparation, en ce compris l'octroi de dommages et intérêts. Dans cette mesure, les articles 1382 et suivants

¹⁴⁴¹ ROBERT KOVAR, "Voies de droit ouvertes aux individus devant les instances nationales en cas de violation des normes et décisions du droit communautaire", *Les recours des individus devant les instances nationales en cas de violation du droit européen: Colloque organisé les 24 et 25 avril 1975 par l'Institut d'Etudes européennes* (Bruxelles, Maison F. Larcier, 1975), pp. 273 et seq.

¹⁴⁴² ANDERSEN, "Quelques réflexions...", *supra* note 1188, pp. 391 et seq.

¹⁴⁴³ In HENRI SIMONART, "La responsabilité du législateur en raison de la méconnaissance de normes supérieures de droit international", *La Responsabilité des Pouvoirs Publics: Actes du Colloque Interuniversitaire organisé les 14 et 15 Mars 1991 par la Faculté de Droit de l'Université Catholique de Louvain et la Faculté de Droit de l'Université Libre de Bruxelles* (Bruxelles, Conseil de l'Europe, Legal Affairs; Bruylant, 1991), pp. 343 et seq.

*paraissent devoir trouver application en cas de non conformité à une règle directement applicable.*¹⁴⁴⁴

Salmon summed up the situation tellingly by stating that “*s’il advient qu’une loi porte atteinte aux droits subjectifs que les citoyens tirent d’un traité directement applicable en droit belge, la loi n’est plus couverte par son immunité et le juge pourrait considérer que le législateur a commis une faute aquilienne.*”¹⁴⁴⁵

In the jurisprudence one can find a number of judgments (unfortunately most of them unpublished), which did not hesitate to order the State to pay for damages caused as a result of a breach of international or European Community law by the legislature.¹⁴⁴⁶ In fact, instances of public liability based on a violation of Community law for shortcomings by the legislature in Belgium emerged as early as 1960.¹⁴⁴⁷ A further instance of a legislative breach of an international obligation, in this case the European Convention of Human Rights, occurred in 1976 when the Belgian judiciary was faced with a State liability claim on the grounds of a judgment by the ECHR, which confirmed a violation of the Convention by the legislature. Interestingly, the legislature’s violation of the ECHR in this case did not consist in a legislative act, but rather in an omission to legislate.

A noteworthy case of a breach of Community law by the Belgian legislature had also been the notorious pension affair concerning European Community servants of Belgian nationality.¹⁴⁴⁸ The Belgian civil servants had complained about the fact that Belgium had not taken the necessary steps to ensure the transfer of pension rights, which they had acquired under Belgian law to the pension system at the Community level. Even though a judgment by the CJEU of 20 October 1981 confirmed that Belgium had indeed violated its obligations under the Treaty, the internal situation did

¹⁴⁴⁴ Ibid, p. 347.

¹⁴⁴⁵ *Adm. Pub. Trim.*, 1977-1978.

¹⁴⁴⁶ DONY, “Le Droit Belge,” *supra* note 1178, pp. 170 *et seq.* See also the previously discussed judgment of *Civ. Brux.*, 5 juin 1985, *supra* note 1254.

¹⁴⁴⁷ Case 6/60, *Jean-E. Humblet v. Belgian State* [1960] ECR 1125.

¹⁴⁴⁸ DONY, “Le Droit Belge,” *supra* note 1178, p. 172.

not change for years. Finally, the *Tribunal Civil de Bruxelles* ruled in an (unpublished) judgment on 9 February 1990 that the State was liable for the legislature's negligence shown on part of the legislature and demanded not only the implementation of the correct legislation with respect to the pension regime, but also or the State to pay compensation.¹⁴⁴⁹

A more recent example, once again affirming the principle of the State's liability for legislative breaches of EC law, was the ruling by the *Cour d'Appel de Liège* of 25 January 1994 concerning discriminatory legislation on university entrance fees in Belgium.¹⁴⁵⁰ In a judgment of 2 February 1988, the CJEU had declared the Belgian regulation on university entrance fees to be discriminatory on the basis of nationality and therefore in breach of (former) Article 7 EC.¹⁴⁵¹ Subsequently, those individuals who had suffered harm as a result of the discriminatory national rules lodged an action for damages against the State. In its reasoning the *Cour d'Appel de Liège* pointed out that according to the Belgian legislation in force the State could be held liable for damage caused to individuals on the basis of Articles 1382 and 1383 of the Civil Code even if the damage had been caused by fault of the national legislature.¹⁴⁵² However, under national law it was understood that in case the liability was grounded on the fact that the legislature had exceeded its competence or had committed a constitutional breach, the *Cour d'Arbitrage* would have to confirm this irregularity in the process of either an action for annulment (*'recours en annulation'*)

¹⁴⁴⁹ In its judgment the Court stated that “*un prejudice est causé par le fait d’une violation du droit communautaire, il incombe à l’État d’en assurer à l’égard de la personne lésée les conséquences dans le cadre des dispositions du droit national relatives à la responsabilité de l’État. Les États membres sont tenus de prendre des mesures qui soient suffisamment efficaces pour faire en sorte que les droits conférés par une norme internationale puissent effectivement être exercés et, le cas échéant, invoqués devant les tribunaux nationaux par les personnes concernées.*” The Court went on to argue that the violation by the Belgian State was rather obvious and “*c’est l’État en tant que tel, valablement représenté par le pouvoir exécutif, qui doit supporter les conséquences de cette négligence, sans pouvoir invoquer les carences voire l’indépendance du pouvoir législatif.*” In Ibid, p. 172.

¹⁴⁵⁰ The decision itself is unpublished, but see Ibid, p. 173 *et seq.*

¹⁴⁵¹ Case 24/86, *Vincent Blaizot v. University of Liège and others* [1988] ECR 00379.

¹⁴⁵² “*Dès lors, sous réserve de l’existence d’une erreur invincible ou d’une autre cause d’exonération de responsabilité, la Cour doit nécessairement décider que le législateur belge auteur de l’acte sanctionné a commis une faute et, pour autant que le lien causal entre cette illégalité et le dommage soit établi, ordonner la réparation de celui-ci.*” As in DONY, “Le Droit Belge,” *supra* note 1178, p. 175.

or in the course of a preliminary question.¹⁴⁵³ Under national law, public liability for legislative breaches was therefore limited to those designated areas which were subject to constitutional review. Such precondition did not apply to breaches of international law or European Community law. In order to establish the absence of fault, the legislature would have to prove the occurrence of an unavoidable error or another reason for exemption. Otherwise, the State was fully liable under the conditions outlined in the CJEU's *Francovich* line of cases.¹⁴⁵⁴

II. State Liability for Judicial Breaches under Belgian Law after *Köbler*

1. Breaches of EC law committed by the judiciary: application of the domestic framework for judicial breaches *ceteris paribus*?

The question of State liability for breaches of EC law by a judicial organ has not, until recently, been explicitly addressed in the doctrine. In the jurisprudence, the only related case in this respect had been the previously discussed *Anca* case, which originated in the famous *De Keyser* judgment by the *Cour de Cassation* of 19 December 1991.¹⁴⁵⁵ The *Anca* case, however, did not specifically deal with a disputed issue under Community law, but was instead referred to the breach of a right protected under the European Convention on Human Rights.¹⁴⁵⁶ Nevertheless, the principled position by the *Cour de Cassation* in this case, which was taken against the absence of a legislative background, allows us to draw some general conclusions concerning the question of State liability for violations of individual rights by a judicial decision. In this manner, the following analysis will try to outline the avenues which could possibly open up for the individual under national law in case of a breach of EC law by a national court in Belgium. Which conditions would apply to such compensatory

¹⁴⁵³ LEROY, "Responsabilité des pouvoirs publics...", *supra* note 1247, pp. 320 *et seq.*

¹⁴⁵⁴ DONY, "Le Droit Belge," *supra* note 1178, pp. 160-161.

¹⁴⁵⁵ Cass. (1^{re} ch.), 8 déc. 1994, *Anca*, *supra* note 1324, pp. 497-498; Cass. (1^{re} ch.), 19 déc. 1991, *De Keyser*, *supra* note 232, pp. 151-152.

¹⁴⁵⁶ The specific provision violated in this case was Article 6 ECHR.

claims for breaches of EC law? And finally, which substantive or procedural hurdles would such claims need to overcome?

We will try to find answers to these specific questions by continuing to examine the case of Belgium, one of our selected national prototypes. In broader terms, however, these answers will mirror in its essentials the prevailing system of State liability for judicial breaches in all the countries which have been included in group IV of our general classification scheme.¹⁴⁵⁷ Based on the apparent lack of substantive legal restrictions in this context, at first glance the legal framework in these Member States appears to be rather open regarding the permissibility of State liability claims for judicial breaches. However, the countries classified under group IV of our categorization actually use an entirely different set of impediments to limit such claims for compensation. These countries pre-condition liability claims for harm incurred by a judicial violation on the compliance with several procedural requirements. As to the individual's access to local remedies, such procedural prerequisites constitute stumbling blocks, which are entirely different in nature from those restrictions we have encountered so far in our three previous groups. Contrary to the current example, the hurdles applied in groups I to III were mostly substantive in nature.¹⁴⁵⁸

In Belgium the *De Keyser* case and its follow-up decision in *Anca* left us with a framework that conditions the admissibility of State liability claims for judicial breaches upon the compliance with several procedural prerequisites, which had been spelled out clearly in the jurisprudence. Already in the *De Keyser* ruling the *Cour de Cassation* neatly summed up all requirements by stating that

[...] the claim for compensation could only be entertained if the act under review had been previously withdrawn, amended, annulled or retracted by a final decision on the ground of a breach of a well-established legal

¹⁴⁵⁷ See graph on p. 408.

¹⁴⁵⁸ In this context 'legally substantive' is to be understood as the opposite of 'procedural'.

norm, whereby the initial decision had lost the authority of *res judicata*.¹⁴⁵⁹

Similar procedural restrictions as the one used in Belgium can be identified in a number of other EU Member States, such as the Czech Republic, Bulgaria and Slovakia.¹⁴⁶⁰ Nevertheless, the number of countries, which rely exclusively on rules of procedure to control the flux of State liability claims for judicial breaches, is fairly low. Far bigger is the number of EU Member States which apply these procedural restrictions in combination with already existing substantive restraints in this context. We encounter such “mixed systems” for example in Austria, Bulgaria, France or Slovakia.¹⁴⁶¹ According to the principle of national procedural autonomy, these restrictions will most likely be applied in an equal manner to cases of State liability for judicial breaches of national as well as Community law.

2. The notion of *res judicata* – A procedural impediment to liability claims?

*‘I prefer injustice to disorder.’ With these blunt words - the absoluteness of which I hasten to repudiate - Johann-Wolfgang von Goethe took sides in what is probably the most complex dilemma in law as a whole: the tense relationship between the desire for justice and the need for certainty.*¹⁴⁶²

While the maxim of absolute State immunity in its most comprehensive form, i.e. in its application to all governmental functions, is a relict of the past that does not exist in any of the 27 EU Member States today, a particular aspect of the principle seems to have resisted all social pressures and reformist trends that strived for far-reaching transparency and accountability of all public functions: the bastion of immunity of the State and its officials for damages to individuals caused by erroneous

¹⁴⁵⁹ Cass. (*I^{re} ch.*), 19 déc. 1991, *De Keyser*, *supra* note 232, p. 152.

¹⁴⁶⁰ See graphs at the end of this chapter, pp. 408-409.

¹⁴⁶¹ See second graph on additional procedural safeguards on p. 409.

¹⁴⁶² Advocate General Colomer in his Opinion in the Case C-310/97P, *Commission of the European Communities v AssiDomän Kraft Products AB, Iggesund Bruk AB, Korsnäs AB, MoDo Paper AB, Södra Cell AB, Stora Kopparbergs Bergslags AB and Svenska Cellulosa AB* [1999] I-5363, para. 1.

judicial decisions has survived in one form or another in most EU Member States.¹⁴⁶³ Generally speaking, based on underlying values such as legal certainty and the principle of judicial independence, the judiciary still enjoys a consolidated Community-wide status of protection, though in varying degrees in different national systems. According to the prevailing system in each Member State, the protectionist attitude towards the judiciary finds its expression, *inter alia*, in special regulations, procedural hurdles and substantive limitations and restrictions governing not only the personal accountability of judges, but also instances of State liability for judicial breaches. In this context, a handful of arguments are usually raised in support of the exalted position of the judicial branch, the most resounding of which appears to be the Latin maxim of *res judicata facit jus*.¹⁴⁶⁴

a) *Res judicata pro veritate accipitur*

Legally speaking, a refined system of appeals is typically thought of as a normal and sufficient way for individuals to seek revision of a judgment by a higher court. There is usually at least one avenue of appeal or review to correct an administrative or judicial decision that, in hindsight, turns out to be wrong in law. The problem is, however, that such appeal or review decisions might also be wrong. In such a case, additional remedies could then be available. At some point, however, in the interest of the principle of legal certainty, the possibility of challenging a previous decision will come to an end. After the exhaustion of the regular system of appeals, every legal dispute will be brought to an end by a final, irrevocable decision. In other words, at that point “law must bow her head to certainty.”¹⁴⁶⁵

As a result, a judgment which has become final, assumes the authority of *res judicata*. This implies that even if that judgment is hypothetically wrong in fact and/or in law, the final decision remains effective and at the same time creates its own right,

¹⁴⁶³ See graphic overview on pp. 408-409.

¹⁴⁶⁴ BERTELMANN, *Die Europäisierung des Staatshaftungsrechts...*, *supra* note 836, , p. 92 *et seq.* and CAPPELLETTI, “Who Watches the Watchmen?‘...,” *supra* note 177, pp. 11 *et seq.*

¹⁴⁶⁵ ROBERTO CARANTA, “Case C-453/00, *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*, Judgment of the Full Court of 13 January 2004” (2005) 42 *CMLR* 1, p. 179.

i.e. '*facit jus*'. Save for very special and rare exceptions, no other evidence can call into question the truth such judgment creates.¹⁴⁶⁶ In connection with the concept of legal certainty, which the principle of *res judicata* serves, it is therefore theoretically untenable that a judgment, which 'creates the law' could at the same time be 'against the law'. In Cappelletti's eyes, however, such strict interpretation of the principle of *res judicata* constituted pure "theoretical absolutism."¹⁴⁶⁷ In other words, while according to Cappelletti *res judicata* could in theory be conceived in absolute terms, in practice such a perception would not be feasible.

b) Competing values – Do we prefer injustice to disorder?¹⁴⁶⁸

In his famous reflection on judicial responsibility and in response to a definition of values coloured by "theoretical absolutism," Cappelletti repeatedly reminded us in his writings that "legal principles are not absolutes."¹⁴⁶⁹ In fact, the essence of his argument was that legal principles were merely as strong as the goal or value encapsulated by them. In light of the fact that every society is faced with a multitude of diverse and sometimes conflicting values which co-exist legitimately, it is obvious that in practice no single value can assert absolute validity. Consequently, the legal principles evolving from these values can also never enjoy unlimited authority.¹⁴⁷⁰ Instead, depending on the circumstances of each case, legal principles and their corresponding values always have to be balanced with competing interests and ideologies, which is a process that requires a fair amount of deliberation and forethought.¹⁴⁷¹

¹⁴⁶⁶ In Latin the absoluteness of this principle has often been described in a picturesque way as "*res judicata facit ex albo nigrum et ex quadrato rotundum*", which can be loosely translated as 'the principle of *res judicata* renders black what is white and round what is squared.'

¹⁴⁶⁷ CAPPELLETTI, "Who Watches the Watchmen?..." *supra* note 177, p. 13.

¹⁴⁶⁸ Following Goethe's statement quoted by Advocate General Colomer in his Opinion in the C-310/97P, *Commission v AssiDomän Kraft*, *supra* note 1463, para. 1: "I prefer injustice to disorder." With these blunt words - the absoluteness of which I hasten to repudiate - Johann-Wolfgang von Goethe took sides in what is probably the most complex dilemma in law as a whole: the tense relationship between the desire for justice and the need for certainty."

¹⁴⁶⁹ CAPPELLETTI, "Who Watches the Watchmen?..." *supra* note 177, p. 13.

¹⁴⁷⁰ *Ibid*, pp. 14 *et seq.*

¹⁴⁷¹ Joined cases 42 and 49/59, *Société nouvelle des usines de Pontlieue - Aciéries du Temple (S.N.U.P.A.T.) v. High Authority of the European Coal and Steel Community* [1961] ECR 53, p. 87.

As stated before, it is generally recognized that the core value behind the maxim of *res judicata* is the principle of legal certainty.¹⁴⁷² ‘*Interest rei publicae ut sit finis litium*’ – which translates as it being in the public interest to put an end to any legal litigation, irrespective of the question of whether or not the final judicial decision is right. While committed to the principle of legal certainty on the one hand, the quest for justice and effective judicial protection of the individual constitutes yet another fundamental aim which stands at the forefront of any legal litigation. A rigorous application of the principle of *res judicata* might at times come at the expense of justice, especially in cases when a final judgment is evidently flawed in fact and/or law. In theory, we are therefore confronted with a conflict of two value-laden legal principles, both of which claim to possess supreme authority. Rigorous adherence to the absolute validity of these two maxims is certainly not the solution to such conflict of values. Rather, as mentioned before, both principles and their related values need to be weighed against each other in each specific case in order to find a pragmatic and reasonable compromise, which can then be applied in practice. This is precisely the approach which had been endorsed early on by the Court of Justice of the EU. As early as 1961 the Court ruled that:

the principle of respect for legal certainty, important as it may be, cannot be applied in an absolute manner, but that its application must be combined with that of the principle of legality; the question which of these principles should prevail in each particular case depends upon a comparison of the public interest with the private interests in question [...].¹⁴⁷³

Far from granting absolute validity to the concept of *res judicata* in the *Köbler* case, the CJEU is usually engaged in a balancing exercise between the competing values of legal certainty on the one hand, and the principle of legality and the individual’s right to justice on the other. Generally speaking, the core issue for the CJEU to resolve was whether there was a general requirement to reopen a judgment,

¹⁴⁷² BERTELMANN, *Die Europäisierung des Staatshaftungsrechts...*, *supra* note 836, p. 96.

¹⁴⁷³ Cases 42 and 49/59, *SNUPAT*, *supra* note 1471, p. 87. The Court’s balancing approach has recently been re-confirmed in the judgment in Case C-234/04, *Rosmarie Kapferer v. Schlank & Schick GmbH* [2006] ECR I-2585, see especially para. 24.

which had become final, in order to ensure the full operation and effectiveness of Community law.¹⁴⁷⁴ The Court of Justice had already been confronted with similar conflicts of values on several occasions. These cases primarily revolved around the principles of effectiveness of Community law and effective legal protection on the one hand, and the maxim of *res judicata* as the guarantor of legal certainty on the other. Accordingly, Caranta referred to “this fundamental legal dilemma” as “striking a balance between the competing claims of law and certainty.”¹⁴⁷⁵ Eventually, the tension between the desire for justice and the need for legal certainty, which Advocate General Colomer once described as “what is probably the most complex dilemma in law as a whole”,¹⁴⁷⁶ inevitably necessitated such a balancing approach by the CJEU. Thereby, the CJEU had frequently paid tribute to the principle of *res judicata*.¹⁴⁷⁷

For example, in 1999 in the well-known *Eco Swiss* ruling,¹⁴⁷⁸ the CJEU confirmed the fundamental value of the maxim of *res judicata*, acknowledging at the same time that it was a basic legal principle shared by all national systems. Moreover, the Court concluded that the principle of *res judicata*, when weighed against effectiveness, had to prevail.¹⁴⁷⁹ In a similar manner, the Court of Justice began its decision in the *Köbler* case by affirming the importance of the maxim of *res judicata*. The Court stressed that “in order to ensure both stability of the law and legal relations and the sound administration of justice” it was essential that final judicial decisions, which have become definite “after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question.”¹⁴⁸⁰

¹⁴⁷⁴ Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-03055. See also XAVIER GROUSSOT and TIMO MINSEN, “Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?” (2007) 3 *European Constitutional Law Review* 3, pp. 385 *et seq.*

¹⁴⁷⁵ CARANTA, “*Kühne & Heitz...*,” *supra* note 1465, p. 179.

¹⁴⁷⁶ Opinion Advocate General Colomer in C-310/97P, *Commission v AssiDomän Kraft*, *supra* note 1463, paras. 1 *et seq.*

¹⁴⁷⁷ The CJEU recently seems to have partly revised its traditional position on this question in the case C-119/05, *Lucchini*, *supra* note 118. Cf. C-234/04, *Kapferer*, *supra* note 1473, paras. 1 *et seq.*

¹⁴⁷⁸ C-126/97, *Eco Swiss*, *supra* note 1474, see especially paras. 31-48.

¹⁴⁷⁹ *Ibid.*, para. 48.

¹⁴⁸⁰ C-224/01, *Köbler*, *supra* note 1, para. 38.

Only recently, a similar case concerning the reopening of a final administrative decision, which in light of the CJEU's subsequent case-law had been contrary to Community law, led the Court to a slightly different outcome from its balancing exercise in *Eco Swiss*. In this particular case,¹⁴⁸¹ the Dutch Administrative Court for Trade and Industry (*College van Beroep voor het bedrijfsleven*) referred a preliminary question to the CJEU asking whether under Community law, in particular under the principle of Community solidarity contained in Article 10 EC, an administrative body was required to reopen a final administrative decision in order to ensure the full operation of Community law as the Court had interpreted it in a subsequent preliminary ruling.¹⁴⁸² The central question in the case *Kühne & Heitz* was once again whether the principle of *res judicata* at the national level affected the general duty to give full effect to Community law and at the same time the duty to guarantee effective judicial protection.¹⁴⁸³

At the start of its decision, the Court underlined once more the importance of the value of legal certainty and the maxim of *res judicata* as a general principle recognized by Community law. Contrary to the Advocate General's Opinion in the case, which had recommended that *res judicata* be set aside to give full effect to Community law, the Court engaged once more in a balancing exercise, trying to reconcile the fundamental value of legal certainty with the principle of effective judicial protection.¹⁴⁸⁴ In earlier decisions, such as in the cases *Peterbroeck*¹⁴⁸⁵ and *van Schijndel*,¹⁴⁸⁶ the Court had already hinted at the fact that the principle of

¹⁴⁸¹ C-453/00, *Kühne & Heitz*, *supra* note 555, paras. 1 *et seq.*

¹⁴⁸² A final administrative decision under Dutch law had been challenged by *Kühne & Heitz*, a company established in the Netherlands, concerning the applicability of a different tariff for export refunds for the export of poultry meat to third countries than the tariff initially applied by the Dutch authorities. Consequently, *Kühne & Heitz* brought a claim against the customs office asking for the reopening of the administrative decision in order to secure the reimbursement of the financial loss that had occurred as a consequence of the false tariff classification. Faced with the reoccurring conflict between legal certainty and effectiveness of Community law, the competent Dutch court referred a question for a preliminary ruling to the CJEU. In this context see also the CJEU's judgment of 12 February 2008 in the Case C-2/06, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas* [2008] (not yet published in *ECR*), as well as C-392/04 and C-422/04, *Arcor*, *supra* note 143, paras. 43 *et seq.*

¹⁴⁸³ C-453/00, *Kühne & Heitz*, *supra* note 555, para. 19.

¹⁴⁸⁴ See Opinion Advocate General Léger in *Ibid*, para. 76.

¹⁴⁸⁵ C-312/93, *Peterbroeck*, *supra* note 848, para. 14.

¹⁴⁸⁶ C-430/93 and C-431/93, *van Schijndel*, *supra* note 848, paras. 17 *et seq.*

effectiveness did not require national courts to set aside every single domestic rule which could potentially cause difficulties in the exercise of a Community right.¹⁴⁸⁷ Accordingly, the CJEU also confirmed the prevalence of the maxim of *res judicata* in *Kühne & Heitz* and held that in principle, administrative authorities would not be required to reopen final administrative decisions.¹⁴⁸⁸ However, given the domestic legal framework in the Netherlands, the CJEU exceptionally opened up a possibility of granting effective judicial protection even past the point of *res judicata*. In fact, the Court generally allowed for a reopening of a final administrative decision, but only under rather strict conditions and, most importantly, only in cases where such possibility was explicitly provided under national law, as was the case in the Netherlands.¹⁴⁸⁹ While in *Kühne and Heitz* and in the Court's subsequent *Kapferer* ruling the pre-eminent position of the principle of *res judicata* remained almost unchallenged, most recently the CJEU's position appears to have somewhat changed as shown in its reasoning in the *Lucchini* case.¹⁴⁹⁰

¹⁴⁸⁷ C-312/93, *Peterbroeck*, *supra* note 848, para. 14: "For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, *the principle of legal certainty* and the proper conduct of procedure, must, where appropriate, be taken into consideration." (emphasis added).

¹⁴⁸⁸ C-453/00, *Kühne & Heitz*, *supra* note 555, para. 24: "Legal certainty is one of a number of general principles recognised by Community law. Finality of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, contributes to such legal certainty and it follows that Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way." See also C-392/04 and C-422/04, *Arcor*, *supra* note 143, paras. 43 *et seq.*

¹⁴⁸⁹ For a detailed account of all the requirements set down by the CJEU see C-453/00, *Kühne & Heitz*, *supra* note 555, para. 28 as well as C-2/06, *Kempter*, *supra* note 1482, paras. 34 *et seq.* For a general discussion of the judgment in *Kühne & Heitz* see amongst others CARANTA, "*Kühne & Heitz*...", *supra* note 1465, pp. 179 *et seq.* Furthermore, a critical analysis of this ruling is provided in WATTEL, "*Köbler, Cilfit and Welthgrove*...", *supra* note 152, pp. 178 *et seq.*

¹⁴⁹⁰ Even though the issues surrounding the question of conflicting legal values and the reviewability of final administrative and judicial decisions are very timely and would in fact justify writing an entirely separate piece of research, we will not pursue these questions any further at this point. It suffices to refer to the Court's ruling in C-234/04, *Kapferer*, *supra* note 1473, as well as the CJEU's recent judgment in C-119/05, *Lucchini*, *supra* note 118 paras. 1 *et seq.* For a detailed discussion of the most recent cases see also PETR BRIZA, "Case comment: Is there anything left of *res judicata* principle?" (2008) 27 *Civil Justice Quarterly* 1, pp. 40-50 and GROUSSOT and MINSEN, "*Res Judicata*...", *supra* note 1474, pp. 385 *et seq.*

Notwithstanding this fascinating and as yet unresolved conflict at the Community level in finding the right balance between the values of legal certainty and the protection of the individual's rights, what remained undisputed in the related case-law was the prominence of the principle of *res judicata* under national and under Community law. However, while seen from one angle the contentious question in the *Köbler* case was predominantly one of balancing different legal values; seen from a different angle the whole problem related back to the absence of a uniform definition of the scope and application of the maxim of *res judicata* under Community law. Despite the growing jurisprudence on these questions and the importance attributed to the maxim of *res judicata* therein, the Court's case-law still leaves open a host of unanswered questions with respect to the exact definition, scope and application of the principle of *res judicata* under Community law. As Groussot and Minssen aptly describe it, the principle of *res judicata* is still in *statu nascendi*.¹⁴⁹¹ And it was precisely the vagueness surrounding this concept that stirred some of the controversy in *Köbler*.

c) *Res judicata*: questions of interpretation

In the countries included in our study, the principle of *res judicata* weighs heavily and to various degrees also finds express mention in the respective national legal framework on public liability. In France, for example, Article 1351 of the Civil Code explicitly refers to the Latin maxim of '*res judicata pro veritate accipitur*',¹⁴⁹² by providing a translation of this principle into French.¹⁴⁹³ Moreover, Article 480 of the French Code of Civil Procedure addresses the same concept in its application as a

¹⁴⁹¹ After the decision in *Köbler* and *Kühne & Heitz*, a number of important judgments have followed, which partly shaped the principle of *res judicata* under Community law. See, for example, C-234/04, *Kapferer*, *supra* note 1473, paras. 1 *et seq.*; C-173/03, *Traghetti*, *supra* note 134, ; C-392/04 and C-422/04, *Arcor*, *supra* note 143, paras. 1 *et seq.*; C-2/06, *Kempter*, *supra* note 1482, paras. 1 *et seq. et al.*

¹⁴⁹² This principle is usually referred to in its shortened form of '*res judicata*' and we will also refer to it as such throughout this study.

¹⁴⁹³ Article 1351 *Code Civil*: "*L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.*"

procedural barrier.¹⁴⁹⁴ In Germany too, a country which appears to have a rather liberal approach in providing for the liability of the State for harm caused by the wrong-doing of public officials in the exercise of their official duties, the principle of *res judicata* has had a significant impact on the general scheme of public liability. With the so-called *Haftungsprivileg*, the law in Germany contains a serious limitation to the far-reaching responsibility of the State.¹⁴⁹⁵ This rule of exception stipulates that under German law (apart from administrative breaches only) damage caused by acts of non-judicial public officials and by those judicial acts which are not endowed with the authority of *res judicata*, can be subject to State liability claims. On the other hand, damage incurred by a final judicial decision, which has already acquired the status of *res judicata*, can never serve as a basis for such compensatory claims. In cases where harm is caused to an individual by a judicial act endowed with *res judicata*, the State's responsibility only ever arises in Germany under two conditions: if the violation constituted a criminal act according to Article 839(2) of the German Civil Code and if the final judicial decision was repealed through extraordinary means of appeal, which under exceptional circumstances have the power to lift the status of *res judicata*.¹⁴⁹⁶ Similar references to the principle of *res judicata* can also be found in other EU Member States.¹⁴⁹⁷

With the intention to warrant the principle of legal certainty, the common understanding of the maxim of *res judicata* across all Member States and also under EU law is that it awards finality to a decision after the exhaustion of all available

¹⁴⁹⁴ Article 480 *Code de Procédure Civile*: “Le jugement qui tranche dans son dispositif tout ou partie du principal, ou celui qui statue sur une exception de procédure, une fin de non-recevoir ou tout autre incident a, dès son prononcé, l'autorité de la chose jugée relativement à la contestation qu'il tranche.”

¹⁴⁹⁵ The ‘*Haftungsprivileg*’ is regulated under Article 839(2) of the German Civil Code.

¹⁴⁹⁶ Article 839(2) *BGB*: “Verletzt ein Beamter bei dem Urteil in einer Rechtssache seine Amtspflicht, so ist er für den daraus entstehenden Schaden nur dann verantwortlich, wenn die Pflichtverletzung in einer Straftat besteht. Auf eine pflichtwidrige Verweigerung oder Verzögerung der Ausübung des Amtes findet diese Vorschrift keine Anwendung.” See detailed analysis of the system applicable in Germany in chapter IV of the thesis. Consult, *inter alia*, KREMER, “Staatshaftung...”, *supra* note 102, p. 480 as well as BERTELMANN, *Die Europäisierung des Staatshaftungsrechts...*, *supra* note 836, p. 213 *et seq.*

¹⁴⁹⁷ Under Belgian law, for example, we find similar provisions on the principle of *res judicata* under the title of “*De la chose jugée*” in Chapter IV (Articles 23 to 28) of the *Code Judiciaire*. In this context, see also a case-specific comparative analysis of the scope and meaning of the principle of *res judicata* in Sweden, Italy, Greece, the UK and the Netherlands in PETER FITGER *et al.*, “*Res judicata*” (1998) *European Review of Private Law* 6, pp. 105 *et seq.*

remedies. In short, for the sake of legal peace and legal certainty, the concept of *res judicata* prohibits the reopening of an already adjudicated question in a separate judicial procedure and thereby prevents the never-ending reassessment of a dispute.¹⁴⁹⁸ Accordingly, in light of the general importance of this principle, the CJEU fully supported the position voiced by the French and the United Kingdom government on this point in the *Köbler* case.¹⁴⁹⁹ Opinions, however, varied as to the precise definition and the ambit of this fundamental principle.¹⁵⁰⁰ At the centre of the discussion was the question of whether the concept of *res judicata* also stretched as far as to ban an indirect reopening of proceedings *qua* a State liability claim for damage caused by an allegedly wrong but final judgment.¹⁵⁰¹ After all, in order to establish whether there had been a judicial violation for which the State could be held responsible, a State liability claim would require at least an indirect revision of the final judgment by the court competent to rule on the question of liability.

Beyond the general definition of *res judicata* as the guarantor of legal certainty, a nuanced interpretation of this fundamental principle is commonly used in certain national legal orders such as in Austria and in Germany.¹⁵⁰² Consequently, these countries accord two separate dimensions to the maxim of *res judicata* and thereby distinguish between the principle's formal definition on the one hand (*Rechtskraft im formellen Sinn*), and its substantive understanding (*Rechtskraft im materiellen Sinn*) on the other.¹⁵⁰³ Under French law a similar distinction is drawn between the two sub-concepts of '*force de la chose jugée*' as opposed to '*l'autorité de la chose jugée*'. The difference between the two approaches essentially lies in the scope of elements of a judicial decision, which acquire binding force and which cannot be questioned in

¹⁴⁹⁸ Cf. Opinion of Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 96.

¹⁴⁹⁹ *Ibid*, para. 38.

¹⁵⁰⁰ In the *Eco Swiss judgment* the CJEU had omitted to define the exact scope and content of the principle of *res judicata* in its application under EC law.

¹⁵⁰¹ On this point see also HOFSTÖTTER, *Non-compliance...*, *supra* note 88, p. 95 *et seq.*

¹⁵⁰² See Article 322 of the German ZPO and Article 411 of the Austrian Code of Civil Procedure. MICHAEL REILING, "Streitgegenstand und Einrede der 'res iudicata' in Direktklageverfahren vor den Gemeinschaftsgerichten" (2002) *EuZW* 5, pp. 136 *et seq.* For Austria see also MEIER, "Prozeßkosten...", *supra* note 642, p. 622.

¹⁵⁰³ Frequently the literature also refers to the principle of *res judicata* in its 'absolute/relative sense'.

another procedure. Generally speaking, the formal understanding of *res judicata* restricts the binding force of a final judgment to ‘the subject-matter in dispute’;¹⁵⁰⁴ or the ‘*Streitgegenstand*’ in German, which is defined by the actual claims asserted by the parties in litigation and decided upon by the court.¹⁵⁰⁵ Hence, a judgment that is not subject to further appeal represents the conclusive adjudication of the claims submitted to the court for decision and thereby acquires the status of *res judicata* in its formal sense. Thus, the decision on the subject-matter in dispute has binding force and cannot be re-litigated in another procedure. Such binding force, however, will exist only in relation to the extent of the claims raised in the procedure. Overall, the formal understanding of *res judicata* is closer to the notion of exhaustion of local remedies and to the validity and certitude of adjudicated issues in other cases.¹⁵⁰⁶

While every judicial decision has to acquire the force of *res judicata* in its formal sense before it can attain the status of *res judicata* in the substantive sense, a formal accomplishment of *res judicata* does not automatically imply that the decision will eventually acquire that same status but also in its substantive meaning. A formal understanding of *res judicata* plainly ascertains that an adjudicated issue cannot be re-litigated. According to a substantive interpretation of *res judicata*, on the other hand, not only the final legal decision, but also the entire substantive outcome of the proceedings is protected. The latter definition of *res judicata* is farther-reaching in that it aims to prevent the subsequent entering into force of any opposing decision on certain litigation. The CJEU, however, has so far not appropriated these sub-concepts to the principle of *res judicata* in its jurisprudence.

¹⁵⁰⁴ Even though the Court of Justice of the EU has not been consistent with the terminology employed in this respect, we will refer to the German expression of ‘*Streitgegenstand*’ by the frequently used English translation of “subject-matter in dispute”. On the question of terminology see REILING, “*Streitgegenstand*...,” *supra* note 1502, p. 137.

¹⁵⁰⁵ See, for example, Article 322(1) of the German ZPO: “*Urteile sind der Rechtskraft nur insoweit fähig, als über den durch die Klage oder durch die Widerklage erhobenen Anspruch entschieden ist.*” Translated as ‘Judgments are capable of binding effect only to the extent that a claim raised by the complaint or a counterclaim has been decided’ in PETER L. MURRAY and ROLF STÜRNER, *German Civil Justice* (Durham/North Carolina, Carolina Academic Press, 2004), p. 357, FN 252.

¹⁵⁰⁶ *Ibid*, p. 357.

d) *Res judicata*: the CJEU's interpretation

While we encounter different interpretations of the maxim of *res judicata* under the legal framework of the various EU Member States, what is decisive for the purposes of the current study is the question of the interpretation given to the principle of *res judicata* under Community law. The interpretation of this principle by the CJEU will not only clarify the general scope of *res judicata* in proceedings under EC law, but will also answer the question of whether the maxim of *res judicata* also extends to public liability claims against a final judgment under Community law. There is no explicit provision separating the principle of *res judicata* in its formal interpretation from the application of this concept in its substantive form under EC law.¹⁵⁰⁷ However, Articles 27(2) and 34(3) of the *European Regulation on Jurisdiction and Enforcement* address the question of whether the subject-matter of a pending case or the subject-matter of a prior judgment for the purposes of the *res judicata* effect should be determined under national procedural law or guided by common European standards.¹⁵⁰⁸ As apparent from the related case-law, the CJEU opted for the establishment of common European standards.¹⁵⁰⁹

According to a formal understanding of this principle, the final decision having acquired the status of *res judicata* would not hinder the individual from bringing a State liability claim for a judicial breach related to a final ruling. As the question of possible State liability is addressed in what constitutes secondary proceedings to the primary litigation, not only the parties involved in the dispute change, but also the subject-matter of the litigation will necessarily be different.¹⁵¹⁰ Consequently, when applying a strictly formal conception of *res judicata* in the *Köbler* case, the final

¹⁵⁰⁷ REILING, "Streitgegenstand...", *supra* note 1502, p. 137.

¹⁵⁰⁸ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels, 27 September 1968). Full-text version available at: <http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm>.

¹⁵⁰⁹ See CJEU, Case 145/86, *Horst Ludwig Martin Hoffmann v. Adelheid Krieg* [1988] ECR 645; Case 144/86, *Gubisch Maschinenfabrik KG v. Giulio Palumbo* [1987] ECR 4861 and Case C-406/92, *The owners of the cargo lately laden on board the ship "Tatry" v. the owners of the ship "Maciej Rataj"* [1992] ECR I-5439.

¹⁵¹⁰ Accordingly, see arguments forwarded by the CJEU in C-224/01, *Köbler*, *supra* note 1, para. 39.

judgment would not be able to preclude Köbler's subsequent liability claim against the Austrian State. After all, while the primary proceedings revolved around the question of whether the claimant was eligible to receive the length-of-service increment of his salary as a university professor, the secondary proceedings were concerned with the subject-matter of the alleged violation of Community law by the Austrian Supreme Administrative Court in its final judgment which had concluded the primary proceedings.¹⁵¹¹

In the *Köbler* case several intervening governments, among them Austria and France, pleaded that the right to reparation for damage caused by a definite judicial decision, which allegedly was in breach Community law, would violate the principle of *res judicata*.¹⁵¹² Similar concerns were raised by the United Kingdom government on this point.¹⁵¹³ Accordingly, it appears to be the case that the Member States' concern for a violation of the principle of *res judicata* were based on a substantive understanding thereof, according to which also an indirect review of the final judgment, which was responsible for the damage, was also precluded.¹⁵¹⁴ Which approach, however, did the Court of Justice take in this context?

Generally speaking, the CJEU has been rather reticent in its case-law with respect to the precise definition of the principle of *res judicata* under European Community law.¹⁵¹⁵ Moreover, the scarce references in its case-law over time have sent mixed messages on the scope and interpretation of the maxim of *res judicata* at the Community level.¹⁵¹⁶ Contrary to the Court's reticence, it has generally been in

¹⁵¹¹ So also SCOTT, "State Liability...", *supra* note 364, pp. 404-405.

¹⁵¹² C-224/01, *Köbler*, *supra* note 1, paras. 20 *et seq.*

¹⁵¹³ *Ibid.*, para. 25. With respect to the British government's position see also ZUCKERMAN, "Appeal to the High...", *supra* note 472, p. 9.

¹⁵¹⁴ For a brief analysis of the principle of *res judicata* and the principle of finality under British law consult, *inter alia*, NEIL ANDREWS, "Civil Procedure" in P. Birks (ed.), *English Private Law, Volume II* (Oxford, Oxford University Press, 2000), pp. 979 *et seq.*

¹⁵¹⁵ REILING, "Streitgegenstand...", *supra* note 1502, p. 138.

¹⁵¹⁶ Over time the CJEU has pronounced itself in various judgments on the issue such as, for example, in Joined cases 172 and 226/83, *Hoogovens Groep BV v. Commission of the European Communities* [1985] ECR 02831, para. 9; Joined cases 271/83, 15, 36, 113, 158, 203/84 and 13/85, *Alan Ainsworth and others v. Commission and Council of the European Communities* [1987] ECR 167 and Case C-281/89, *Italian Republic v. Commission of the European Communities* [1991] ECR I-347, paras. 12-16.

the Advocates General's Opinions that the question was addressed more thoroughly. Advocate General Lagrange, for example, had proclaimed as early as 1963 in the *Da Costa* case that "its binding effect is only relative and exists only in so far as there is identity of parties, cause and object."¹⁵¹⁷ Accordingly, the triple identity of the subject-matter, the cause of action and the parties in the dispute formed the backbone of Lagrange's understanding of *res judicata*. The same definition was applied forty years later by Advocate General Léger in the *Köbler* case where he argued that

[a]ccording to the prevailing traditional definition, the legal authority of a judicial decision – and, as a consequence, *res judicata* – is applicable only in certain circumstances, where there is a threefold identity – of subject-matter, legal basis and parties – between a dispute already resolved and a subsequent dispute. The legal authority of a decision is thus in principle relative and not absolute.¹⁵¹⁸

As stated above, the principle of *res judicata* has not been explicitly regulated in the EC Treaty, but in its case-law the Court of Justice has repeatedly referred to the importance of this concept as the guarantor of legal certainty and the sound administration of justice.¹⁵¹⁹ Thereby, as recently demonstrated in the *Köbler* ruling, the Court seemed to lean towards a narrower reading of this principle. Of late such a formal interpretation of *res judicata* has also been confirmed in the Opinion by Advocate General Geelhoed in the *Lucchini* case.¹⁵²⁰ In essence, the CJEU rejected the substantive interpretation of the principle of *res judicata* in *Köbler* and instead endorsed a rather narrow and formal understanding thereof. Thereby, the Court strictly adhered to the cumulative occurrence of the triple identity – cause, object and party – when assessing whether a claim was precluded by the procedural hurdle of *res judicata*. In support of such interpretation, the Court underlined in the *Köbler* ruling

¹⁵¹⁷ Opinion Advocate General Lagrange in Joined cases 28 to 30/62, *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Netherlands Inland Revenue Administration* [1963] ECR 61.

¹⁵¹⁸ Opinion of Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 101.

¹⁵¹⁹ See the CJEU's wording in *Ibid*, para. 38. See also cases mentioned under FN 1516.

¹⁵²⁰ See Advocate General Léger in *Ibid*, para. 101 and Opinion Advocate General Geelhoed in C-119/05, *Lucchini*, *supra* note 118 para. 36. On the *Lucchini* case see also BRIZA, "Case Comment...", *supra* note 1490, pp. 40-50.

that “it should be borne in mind that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*.”¹⁵²¹ The CJEU maintained a strict distinction between primary and secondary proceedings by insisting that the secondary remedy of reparation did not require a review of the previous judicial decision, which had caused the damage. Consequently, despite the importance attributed to the principle of *res judicata*, the Court concluded in *Köbler* that it was simply not justified in practice to disclaim entirely the existence and the validity of a principle of State liability for erroneous judicial acts.¹⁵²²

It is in light of all the above considerations that one should read the negative and often even harsh reactions in the literature concerning the CJEU’s reasoning in the *Köbler* ruling with respect to the principle of *res judicata*. Commentators are naturally influenced by their respective national legal background in the way they approach and interpret the principle of *res judicata*. Frequently it is in the countries adhering to group I of our classificatory scheme that a broader interpretation of the principle of *res judicata* is amongst others a reason for the reluctant attitude towards the CJEU’s solution in *Köbler*. Taking into account the national legal background of various commentators, it is therefore not surprising that in a country like the Netherlands, where we are faced with a total exclusion of the principle of State liability for judicial breaches, voices in the literature accused the CJEU of simply ignoring the principle of *res judicata* in its *Köbler* ruling and merely paying “lip service”¹⁵²³ to its importance.¹⁵²⁴ These considerations also throw a different light on the harsh critique of Adrian Zuckerman, Professor of Civil Procedure at the University of Oxford, in his comments on the CJEU’s interpretation of the principle of *res judicata* in *Köbler*,

¹⁵²¹ C-224/01, *Köbler*, *supra* note 1, para. 39. Critical of the CJEU’s interpretation SCHÖNDORF-HAUBOLD, “Die Haftung...,” *supra* note 110, p. 115.

¹⁵²² C-224/01, *Köbler*, *supra* note 1, para. 40. In a similar vein, TRIDIMAS, “State Liability...,” *supra* note 91, p. 157; see also HOFSTÖTTER, *Non-compliance...*, *supra* note 88, p. 104.

¹⁵²³ WATTEL, “*Köbler*, *Cilfit* and *Welthgrove*...,” *supra* note 152, p. 177. Peter Wattel is Advocate General in the Netherlands’ *Hoge Raad*.

¹⁵²⁴ For a more detailed analysis of the Dutch legal framework surrounding the question of State liability for judicial breaches see chapter III on pp. 152 *et seq.*

which he labelled as “unconvincing”,¹⁵²⁵ and on the Court’s classification of damages claims as secondary proceedings to the original action, which he described as straining “legal technicality to the point of farce”.¹⁵²⁶ His dismissive attitude towards the concept of State liability for judicial breaches, as established by the CJEU in *Köbler*, is undeniably influenced by the longstanding legal tradition in the United Kingdom of according absolute immunity to the judiciary and protecting the finality of litigation *inter alia* through an all-encompassing interpretation of the principle of *res judicata*.¹⁵²⁷

e) The limits of *res judicata* under the principle of national procedural autonomy

After a detailed elaboration of the definition and scope of the principle of *res judicata* on the Community level, it is now time to analyse to what extent national procedural rules may actually preclude or limit State liability with regard to the general principles and restrictions that were established in *Köbler*. With reference to the principle of national procedural autonomy, the CJEU has outlined very clearly that in the absence of Community rules it is for the Member States “to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law.”¹⁵²⁸ In this respect the Court established two core principles to assess the Community legality of national procedural law. The first, the principle of equivalence demands that national procedural rules be not less favourable than those governing similar domestic situations and the second, the principle of effectiveness assures that it is not impossible in practice or excessively difficult to exercise the right conferred by the Community legal order.¹⁵²⁹

¹⁵²⁵ ZUCKERMAN, “Appeal to the High...,” *supra* note 472, p. 11.

¹⁵²⁶ *Ibid*, p. 11.

¹⁵²⁷ See *Ibid*, pp. 10-12. For further details on the application of the *Köbler*-doctrine under the legal system of England and Wales see chapter I.

¹⁵²⁸ Case 33/76, *Rewe-Zentralfinanz*, *supra* note 143, para. 5.

¹⁵²⁹ *Ibid*, para. 6. Only recently confirmed in C-392/04 and C-422/04, *Arcor*, *supra* note 143, para. 57.

Does the existing procedural framework under Belgian law allow for the full effectiveness of the individual's right to claim compensation in case of a violation of Community law by the national judiciary? Is the principle of *res judicata*, which is applied as a procedural hurdle to State liability claims in countries classified under group IV, in conformity with Community law? To what extent are additional procedural barriers under national law justified and applicable towards compensatory claims by individuals for judicial breaches of EC law?

i) Res judicata as an absolute procedural obstacle?

In response to the question of whether the subject-matter of a pending case or the subject-matter of a prior judgment for the purposes of the *res judicata* effect should be determined under national procedural law or guided by common European standards, the CJEU has established early on in its case-law that a common European standard should be applied.¹⁵³⁰ As the principle of *res judicata* itself does not enjoy a uniform application under the national procedural law of the various EU Member States, it appears obvious that on the Community level the procedural rule of *res judicata* should be guided by common European standards, which the CJEU already outlined in its jurisprudence on the question.¹⁵³¹ In fact, starting with the *Eco Swiss* case,¹⁵³² the Court has provided a definition of the maxim of *res judicata* as applied under Community law, which appeared to lean more towards a formal understanding of this principle. This interpretation has subsequently also been re-confirmed in the CJEU's *Köbler* ruling. To follow the Court's reasoning in *Köbler* would therefore also require a rather narrow reading of the principle of *res judicata* for cases with a Community law focus under national law.¹⁵³³

In the course of the development of the CJEU's case-law on Member State liability we have already encountered a comparable situation to the one faced by

¹⁵³⁰ See CJEU, Case 144/86, *Gubisch*, *supra* note 1509, Case C-406/92, *Tatry v Maciej Rataj*, *supra* note 1508, and Case 145/86, *Hoffmann v Krieg*, *supra* note 1509, 145/86, *et al.*

¹⁵³¹ See cases listed under FN 1516.

¹⁵³² C-126/97, *Eco Swiss*, *supra* note 1474, paras. 1 *et seq.*

¹⁵³³ C-224/01, *Köbler*, *supra* note 1, paras. 39-40.

countries in group IV of our classification scheme, even if in a slightly different context. In the famous *Factortame* case the Court had to deal with the question of whether in a case with Community law relevance a procedural rule under English law, which prevented a court from granting interim relief, should be set aside.¹⁵³⁴ Back then, the Court, with reference to the *Simmenthal* judgment,¹⁵³⁵ answered that

any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law.¹⁵³⁶

Thus, the *Factortame* ruling has a clear bearing on the situation we are facing under Belgian law just now. In case national procedural rules do not comply with the principle of effectiveness and the principle of equivalence, both of which guarantee for the full effectiveness of Community rights, a *Factortame*-like situation arises where those national rules impairing the effectiveness of Community law are to be set aside. In other words, in the case of Belgium and all the other countries contained in group IV of our classification scheme, the principle of *res judicata* as applied under national law has to meet the standards and limits that have been set up by the CJEU concerning the principle of national procedural autonomy. As we have seen in the previous analysis, the Court of Justice most recently applied a rather narrow interpretation of the maxim of *res judicata*, which leans more towards a formal definition of this principle.¹⁵³⁷ Thereby, the triple identity of cause, object and parties

¹⁵³⁴ C-213/89, *Factortame*, *supra* note 8, paras. 1 *et seq.*

¹⁵³⁵ Case 106/77, *Simmenthal*, *supra* note 396, paras. 1 *et seq.*

¹⁵³⁶ C-213/89, *Factortame*, *supra* note 8, para. 20.

¹⁵³⁷ See C-224/01, *Köbler*, *supra* note 1, paras. 39-40.

is an indispensable precondition whenever a plea of *res judicata* is entertained as a procedural bar to re-litigate a specific claim under EC law.

According to the rule of national procedural autonomy, in a case with Community-law relevance, the definition, scope and application of the principle of *res judicata* can therefore under no circumstances be less favourable than the application of the same principle under domestic law. Due to the fact that contrary to most Member States the CJEU applies a minimalist reading of the principle of *res judicata* in this context, the principle of equivalence will probably not cause any major difficulties in practice. After all, it is the Member States' broader understanding of *res judicata* which increases the instances when *res judicata* operates as a procedural hurdle and hence, renders it impossible for the individual to lodge his/her claim for liability.

However, it is the second requirement, the principle of effectiveness, which might cause problems at times. In fact, the principle of effectiveness requires that the particular procedural rule, namely the principle of *res judicata*, does not render it "impossible in practice or excessively difficult"¹⁵³⁸ to exercise the individual's right conferred by the Community legal order. The application of the national procedural barrier of *res judicata* in cases related to EC law is therefore not entirely contrary to Community law. As in the case of *Traghetti*, where we were dealing with the limits of substantive national restrictions to the principle of State liability, the application of the national procedural element of *res judicata* will also have to meet the standards established by the CJEU. The rather broad interpretation of the maxim of *res judicata* under the legal framework of several Member States might allow for a wider scope of application than under the rather restricted definition of the same principle under Community law. In fact, the application of the principle of *res judicata* in certain Member States might at times be so wide as to make it impossible in practice or excessively difficult for the individual to exercise his/her Community right and therefore, *de facto* exclude a State liability claim for judicial breaches of EC law entirely.

¹⁵³⁸ C-46 & 48/93, *Brasserie*, *supra* note 4, para. 74.

Although it remains possible under the principle of national procedural autonomy for national law to define the criteria relating to the procedural assertion of the claim, which must be met before State liability can be incurred for an infringement of Community law attributable to a national court, under no circumstances may such criteria impose requirements stricter than those set out by the CJEU in the *Köbler* judgment and others on the interpretation, scope and limits of the principle of *res judicata*.¹⁵³⁹ Accordingly, a wide scope of interpretation, such as the substantive definition of the principle of *res judicata* as applied in several Member States would violate the principle of effectiveness and therefore be contrary to Community law. Consequently, in the case of Belgium as well as in all the other Member States belonging to group IV of our classification scheme, the application of the procedural rule of *res judicata* cannot be stretched as far as to bar entirely State liability claims for judicial breaches. In other words, Community law prohibits national procedural legislation, which generally excludes State liability, for damage caused to individuals by an infringement of Community law attributable to a court by simple reason of the fact that the judgment has acquired the force of *res judicata*.¹⁵⁴⁰ Applied to the specific case of Belgium, this means that the procedural barrier of *res judicata* as established in the *De Keyser* and the *Anca* ruling, violates the effective protection of individual rights under Community law. Therefore, in cases with a Community-law focus, this general restriction under national law will have to be lifted. An analogous conclusion arises, for example, for Luxembourg, Portugal, the Czech Republic and Bulgaria, which, at least as far as this question is concerned, face the same constellation as Belgian law.¹⁵⁴¹

¹⁵³⁹ Only recently confirmed by the CJEU in the cases C-392/04 and C-422/04, *Arcor*, *supra* note 143, para. 57 as well as C-2/06, *Kempter*, *supra* note 1482, para. 57. In *Arcor* the Court stated in para. 57 that: "It must be borne in mind that, according to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)."

¹⁵⁴⁰ C-224/01, *Köbler*, *supra* note 1, para. 40.

¹⁵⁴¹ For a brief comparative overview see also TONER, "Thinking the Unthinkable...", *supra* note 100, pp. 170-171.

ii) Additional procedural safeguards: the primacy of appellate review

Generally speaking, there is usually at least one venue of appeal to correct a judicial decision that in hindsight turns out to be wrong in law. It is, however, the responsibility of the individual who is raising doubts in this respect to make use of the system of appeals and to fulfil the requirements attached to launching such a claim. In order to assess the importance of appellate review as the overriding procedure to challenge a judicial decision, in a number of Member States belonging to the fourth group of our classification scheme, an additional procedural hurdle to State liability claims for judicial breaches has been established. The procedural obstacle in Member States such as Hungary, the Czech Republic and Belgium consists in the absolute primacy of appellate review, meaning that it excludes entirely the application of the principle of State liability for judicial breaches in case the harmed individual has intentionally or negligently failed to resort first to the regular system of appeals. Even outside the realms of group IV, namely in countries belonging to group I, II and III, a number of Member States apply the principle of primacy of appellate review as an additional procedural hurdle to pre-existing substantive impediments against the invocation of State liability claims for harm caused by a judicial decision. Under Estonian law, for example, Article 7(1) of the State Liability Act stipulates that

[a] person whose rights are violated by the unlawful activities of a public authority in a public law relationship [...] may claim compensation for damage caused to the person if damage could not be prevented and cannot be eliminated by the protection or restoration of rights [...].¹⁵⁴²

In Austria, a country which has been classified under group II and III, the primacy of appellate review is explicitly regulated in Article 2(2) of the Liability of Public Bodies Act¹⁵⁴³ and in Finland the same principle can be found in Chapter 3 Section 4 of the

¹⁵⁴² Article 7(1) State Liability Act.

¹⁵⁴³ Article 2(2) AHG: “Der Ersatzanspruch besteht nicht, wenn der Geschädigte den Schaden durch Rechtsmittel oder durch Beschwerde an den Verwaltungsgerichtshof hätte abwenden können.” See commentary on Article 2(2) AHG in FEIL, *Amtshaftung*, *supra* note 543, , pp. 45-46. For a detailed analysis of the legal situation prevailing in Austria see chapter IV.

Finish Tort Liability Act.¹⁵⁴⁴ Equivalent legal provisions regulating the primacy of appellate review exist furthermore in countries such as Germany, Spain, Poland and Slovakia.¹⁵⁴⁵

Seen from this perspective, the principle of *res judicata* is not only an imperative to the principle of legal certainty and the efficiency of the judicial process, but it also has a scope that goes beyond those two aims.¹⁵⁴⁶ In fact, according to Normand, the principle of *res judicata* “*devient alors un moyen de contrôle et de sanction de la diligence des parties, un instrument de rationalisation et de moralisation des stratégies judiciaires.*”¹⁵⁴⁷ In Normand’s understanding the maxim of *res judicata* therefore also serves as a tool to control and to sanction the diligence of the parties in the course of litigation. Should they intentionally or negligently fail to resort to the regular system of appeals, they will consequently also lose the right to lodge a liability claim against the State for damage caused by the judicial decision. Due to the contributory negligence of the claimant, the principle of *res judicata* is awarded precedence in such cases. In other words, in the name of *res judicata* the primary use of the system of appeals constitutes a procedural hurdle to be overcome by the claimant. In this sense, the principle of *res judicata* almost constitutes an instrument of rationalization and moralization of the judicial strategies entertained by the different parties.¹⁵⁴⁸

From a national law perspective, such a solution appears to be reasonable and justified.¹⁵⁴⁹ The question, however, is whether this procedural impediment to public liability claims for judicial breaches is also in conformity with the requirements of European Community law? By this question, we are essentially asking whether

¹⁵⁴⁴ *Tort Liability Act* (31.5.1974/412, latest amendment 16.6.2004/509).

¹⁵⁴⁵ For a comprehensive overview of all the Member States applying this principle see graph on p. 408.

¹⁵⁴⁶ MAURICE BENCIMON *et al.*, “Autorité de la chose jugée et immutabilité du litige” (1997) *Justices, Revue Générale de Droit Processuel* 5, pp. 157 *et seq.*

¹⁵⁴⁷ *RTD civ.* 1995.170.

¹⁵⁴⁸ *Ibid.*

¹⁵⁴⁹ With reference to the procedural hurdle requiring the primary use of the regular appellate system within the EU see graph on p. 408.

Community law precludes the application of a procedural provision of national law, such as Article 2(2) of the Austrian Liability of Public Bodies Act, which seeks to lay down the principle of primacy of appellate review in so far as the application of that provision precludes a State liability claim against a judicial decision which has been found to be incompatible Community law.¹⁵⁵⁰

In response to this question, we must first remind ourselves of the guiding principles behind the maxim of national procedural autonomy, which we have already briefly addressed in chapter I of our study. As the CJEU has only recently reiterated in the *Arcor* case,

in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).¹⁵⁵¹

Accordingly, in view of the Court's traditional *dictum* concerning the limits of national procedural autonomy, a national procedural rule such as the primacy of appellate review also has to be evaluated in light of the principles of equivalence and effectiveness.¹⁵⁵² In order to assess the application of the procedural principle of

¹⁵⁵⁰ On this specific provision under Austrian law see, *inter alia*, KUCSKO-STADLMAYER, "Voraussetzungen...", *supra* note 780, p. 22.

¹⁵⁵¹ C-392/04 and C-422/04, *Arcor*, *supra* note 143, para. 57. On the principle of national procedural autonomy see also C-302/97, *Konle*, *supra* note 7, paras 1 *et seq.*

¹⁵⁵² The CJEU was faced with a similar issue in the *Peterbroeck* ruling of 1993 where the central question was "whether Community law precludes application of a domestic procedural rule whose effect [...] is to prevent the national court, seised of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period." See C-312/93, *Peterbroeck*, *supra* note 848, para. 11.

primacy of appellate review in light of Community law, the CJEU will follow the method already used in the *Peterbroeck* judgment.¹⁵⁵³ In that case the Court had proclaimed the general rule that

each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.¹⁵⁵⁴

In sum, the central question in this context is whether the procedural principle of primacy of appellate review renders it impossible in practice or excessively difficult for the individual to exercise his/her right under Community law to lodge a State liability claim for harm caused by a final judicial decision. This question will certainly have to be answered by reference to the Court's approach of considering the role, the progress and the features of this procedural provision in the different context of each national legal system.

¹⁵⁵³ Ibid.

¹⁵⁵⁴ Ibid, para. 14.

III. Graphic overview of GROUP IV

Graph a): Procedural Obstacles to a Comprehensive Recognition of State Liability for Judicial Breaches

Various PROCEDURAL HURDLES to overcome	BELGIUM	CYPRUS	CZECH REPUBLIC	LITHUANIA	LUXEMBOURG	POLAND	SLOVAKIA
Exclusion of State liability if the act has acquired the status of RES JUDICATA	✓		✓ ¹⁵⁵⁵		✓		✓
Primary use of appellate review = MITIGATION DUTY	✓		✓		✓	✓	✓
The judgment must be REVOKED/ ANNULLED/ OVERTURNED or QUASHED as unlawful prior to damages claim	✓ ¹⁵⁵⁶	✓ ¹⁵⁵⁷	✓	✓		✓ ¹⁵⁵⁸	✓

¹⁵⁵⁵ It is required that the judicial act be annulled first before one can lodge a damages claim against the State. Furthermore, State liability claims presume the previous exhaustion of all remedies (Article 8 of Act No 82/1998).

¹⁵⁵⁶ “[L]’annulation de l’acte du juge est une condition nécessaire à l’admission d’une éventuelle responsabilité de l’Etat “, *Brux.*, 8 déc. 1999, *Decamp*, *supra* note 1383, p. 338.

¹⁵⁵⁷ Article 146.6 of the Constitution of Cyprus.

¹⁵⁵⁸ Article 417¹(2) Civil Code (See Law on the Revision of the Civil Code of 17 June 2004 *Dziennik Ustaw* 2004, no. 162, at 1692).

Graph b):

Additional Procedural Safeguards applied in countries of GROUP I, II and III

PROCEDURAL HURDLES in addition to existing substantive restrictions	AUSTRIA	FRANCE	DENMARK	ESTONIA	FINLAND	PORTUGAL	GERMANY ¹⁵⁵⁹	LATVIA	ROMANIA	HUNGARY	SPAIN	SWEDEN
Exclusion of State liability if the act has acquired the status of RES JUDICATA		✓			✓	✓ ¹⁵⁶⁰						
Primary use of appellate review =MITIGATION DUTY	✓ ¹⁵⁶¹		✓	✓	✓		(✓) ¹⁵⁶²	✓ ¹⁵⁶³	✓	✓ ¹⁵⁶⁴	✓	✓ ¹⁵⁶⁵
The judgment must be REVOKED/ANNULLED/ OVERTURNED or QUASHED as unlawful prior to damages claim					✓ ¹⁵⁶⁶		(✓)					

¹⁵⁵⁹ Only applicable to ministerial judicial acts outside the scope of judicial acts *stricto sensu*.

¹⁵⁶⁰ However, the doctrine argues that this is the case except in instances of State liability for judicial acts, which are manifestly unconstitutional and illegal or which violate fundamental rights.

¹⁵⁶¹ Article 2(2) *AHG*.

¹⁵⁶² According to Article 839(3) *BGB*, the claim for damages is excluded if the injured party has failed to avert the damage by making use of available appeal procedures.

According to the CJEU this provision under German law does not violate Community law (C-46 & 48/93, *Brasserie*, *supra* note 4, , para. 84 *et seq.*) In this context see also CLASSEN, "Case C-224/01...", *supra* note 102, p. 819.

¹⁵⁶³ Section 96 of the Law on Administrative Procedure.

¹⁵⁶⁴ Article 349 *BGB*.

¹⁵⁶⁵ Chapter 3, section 4 of the Swedish Tort Liability Act.

¹⁵⁶⁶ Chapter 3, section 5 of the Finish Tort Liability Act provides: "No action for damages can be brought for injury or damage caused by a decision of the Government, a Ministry, the Cabinet Office, a court of law or a judge, unless the decision has been amended or overturned or unless the person committing the error has been found guilty of misconduct or rendered personally liable in damages."

Final Analysis & Concluding Remarks

It follows from this comparative legal analysis that the principle of State liability for the acts or omissions of supreme courts can be acknowledged as a general principle of Community law.¹⁵⁶⁷

Advocate General Léger in his Opinion in *Köbler*.

“A sceptic demands proof.”¹⁵⁶⁸ – and indeed, it was our scepticism in response to the *Köbler* ruling that prompted us to embark on this comparative journey. Now, at the end of it, it is time to return to our initial questions and to compare the fruits of our labour with the results achieved in the Advocate General’s comparative assessments in *Köbler* to see whether our initial scepticism was justified or not. Before we do that, we will, however, remind ourselves of the premises that had constituted the basis for our research study, i.e. the results of Advocate General Léger’s comparative findings and the EU-wide spectrum of State liability regimes for judicial breaches which he had laid out in paragraphs 77 to 85 of his Opinion in the *Köbler* case and introduced with the following statement:

To my understanding, all the Member States accept the principle of State liability for judicial acts. All – except for the moment *Ireland* – accept that principle in respect of judgments themselves where they infringe legal rules applicable in their territory, in particular where there is a breach of fundamental rights.¹⁵⁶⁹

It was only then that he presented us with the detailed results of his comparative assessment in paragraphs 79 to 81, namely that

¹⁵⁶⁷ Opinion, Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 85.

¹⁵⁶⁸ HARLOW, *Accountability*., *supra* note 721, p. 1.

¹⁵⁶⁹ C-224/01, *Köbler*, *supra* note 1, para. 77 (emphasis added).

[a]s regards the nature of the legal rule, only the *United Kingdom* and the Kingdom of the *Netherlands* clearly limit the scope of State liability to cases of infringement of the rules laid down in Article 5 (deprivation of liberty) or Article 6 of the ECHR (relating to the guarantees of a fair hearing *in procedendo*, that is while the judgment is being prepared, and not the guarantees *in iudicando*, that is those relating to the content of the judgment itself).

All the other Member States - excluding the *Hellenic*, *Portuguese* and *French* Republics, where the situation is evolving and more nuanced - accept the principle of State liability irrespective of the nature of the legal rule infringed.

As regards the source of the judgment, only the Republic of *Austria* and the Kingdom of *Sweden* limit State liability to the decisions of ordinary courts, excluding those of supreme courts. [...].¹⁵⁷⁰

Subsequently, the CJEU declared in its final ruling with explicit reference to the Advocate General's comparative findings, that the "application of the principle of State liability to judicial decisions has been accepted in one form or another by most of the Member States."¹⁵⁷¹

Now, at the end of a large comparative study including not only the then 15 Member States, but an enlarged Europe of 27, we can answer our initial question: was the Advocate General's assertion correct to speak about common principles of the Member States?

¹⁵⁷⁰ Opinion Advocate General Léger in Ibid, paras. 79-81 (emphasis added).

¹⁵⁷¹ Ibid, para. 48.

I. The Comparative Evidence: Legal Cartography

1. Final legal taxonomy

As outlined in chapter II, our methodological framework was based on two basic parameters. First, we restricted our analysis to judicial breaches *stricto sensu*, that is judicial acts taken in the course of contentious court proceedings.¹⁵⁷² With this first delimitation we tried to adjust to the parameters which had dominated the Advocate General's as well as the CJEU's comparative approach. We have nevertheless in the course of this study tried to see the issue from a bigger perspective whenever possible, so that we have not only looked at the possibility of invoking State liability claims against judicial acts *stricto sensu*, but have tried to take as wide an approach as possible by including ministerial judicial acts in our analysis. Secondly, while Léger's approach concerning the width of his comparative analysis is not entirely clear in his Opinion, we have once again taken a broader approach in that we did not merely restrict our analysis to the possibility of invoking State liability claims against national courts adjudicating at last instance, but sought to look at national regimes in more general terms including options or restrictions to State liability claims for erroneous acts of lower instance courts. We will, however, in the course of comparing our results with those obtained by the Advocate General in his comparative analysis in *Köbler* certainly adjust to the parameters used by Léger in order to be able to achieve a comparable output.

Based on these guidelines and our choice of methodology which we had already outlined quite early in our study,¹⁵⁷³ but which has nonetheless remained consistent throughout the entire process, we are now able to present the following geographical mapping of the European landscape of State liability for judicial breaches in an enlarged European Union of 27 Member States.

¹⁵⁷² For a precise definition of the terminology we employed in the course of this study see chapter II, pp. 44 *et seq.*

¹⁵⁷³ For further details on the methodological approach of this study consult chapter II, pp. 43 *et seq.*

2. Graphic overview of the results of our survey

EU MEMBER STATE	Total EXCLUSION of State Liability for Judicial Breaches under National Law	RESTRICTED Form of State Liability for Judicial Breaches under National Law...		PROCEDURAL Obstacles to a Comprehensive Recognition of State Liability for Judicial Breaches
		...depending on the SOURCE/NATURE of the judicial act	...limited by the degree of FAULT in the judicial violation	
Austria				
Belgium				
Bulgaria				
Cyprus				
Czech Republic				
Denmark				
England				
Estonia				
Finland				
France				
Germany				
Greece				
Hungary				
Ireland				
Italy				
Latvia*	n.a.	n.a.	n.a.	n.a.
Lithuania				
Luxembourg				
Malta*				
Netherlands				
Poland				
Portugal				
Romania				
Slovakia				
Slovenia				
Spain				
Sweden				

* with reservations.

3. Summary and survey of the results: “E Pluribus Unum”?

On the basis of the wealth of information we have gathered on the various national concepts of State liability, we have arrived at a classification of the wide scope of systems applicable in the various Member States into four different groups, whose characteristics we have already presented in the second chapter of this study. Now, having established a comprehensive cartography providing an overall picture of the European landscape with respect to the notion of State liability for judicial breaches, we can proceed to drawing our concluding observations and contrast them with the conclusions drawn on the same question by Advocate General Léger in *Köbler*.

a) Obstacles....common to the laws of the Member States

i) General observations on the 27 Member States

Overall, the European landscape of national systems of State liability for judicial breaches is multifaceted and diverse, not only with respect to the structure of the various national liability regimes, but also with respect to their legal bases. In fact, already methodologically speaking, when it comes to erroneous judicial acts the field of public tort law seems to a certain extent unsettled. First, liability of public authorities is not always governed by tort law. In France, as we have seen, liability consists in principle of a two-track system that combines private law and administrative law (*droit administratif*).¹⁵⁷⁴ Germany also provides a two-track system but here the State's liability is generally considered as a private and not as a public law affair. English law is purely tort oriented in that it does not contain special rules concerning public liability. Torts in the United Kingdom simply apply to private individuals and bodies as well as public authorities.¹⁵⁷⁵

¹⁵⁷⁴ See elaborate analysis of the French system of State liability in chapter V, especially pp. 232 *et seq.*

¹⁵⁷⁵ On the concept of tort see chapter III, pp. 102 *et seq.*

Furthermore, our research has demonstrated that there are basically three principal approaches dominating the European landscape. First, there are those countries where rules concerning the State's liability especially with respect to judicial breaches are grounded on a firm normative/statutory basis. Examples for such countries would be for instance the Austrian, the Italian or the UK framework of State liability for erroneous judicial acts.¹⁵⁷⁶ In many cases, such as for example in Greece or Belgium, it is due to the silence of the legislature on the specific question, that an established jurisprudence has developed over time which lays out the guiding principles and applicable standards on this issue. The latter constitutes the second approach we have encountered in the course of our research.

Finally, the most difficult situation arose in those Member States where in addition to the silence of the legislature concerning the State's liability regime for judicial breaches also the jurisprudence had not developed a unified stance on the question. It appears that such a situation dominates the State liability regime in Malta, which consequently rendered it rather difficult for us to classify such a country. Nevertheless with respect to the Maltese framework of State liability for judicial breaches, there is at least in the legal doctrine apparently strong support for the restriction of such cases of liability to judicial violations of one of the "fundamental rights and freedoms of the individual" as outlined in Articles 32 to 45 of the Maltese Constitution. However, such an action would be based on a special procedure which has been regulated under Article 46 of the Constitution.¹⁵⁷⁷ In essence, such a regime would place Malta in the category with countries such as the UK or Ireland, which only ever allow for claims of State liability for judicial breaches in highly exceptional cases of fundamental human rights violations. Due to the uncertainty prevailing over the applicable regime in Malta, we have therefore marked the classification of this country to group I with an asterisk.

¹⁵⁷⁶ See analysis in chapters III and IV.

¹⁵⁷⁷ A full-text version of the Maltese Constitution is available at www.legal-malta.com/law/constitution.htm.

Notwithstanding the differences in methodology and structure of the various national approaches to State liability for judicial breaches, one startling commonality which is self-evident among the 27 Member States is that in almost every country State liability for judicial breaches is subject to rigorous restrictions, be they of a substantive or of a procedural nature. At times these limitations even apply cumulatively and hence, render the specific liability regime even more restrictive. In many countries, such as in Austria, Portugal, Hungary or Spain, substantive restrictions are paired with additional procedural hurdles, which also have to be overcome by the claimant. Moreover, the common-law world has generally shrouded the judiciary in the protective cloak of judicial immunity, which at the same time renders the State (Crown) immune to any liability claims based on erroneous judicial acts. Overall, the restrictions vary to a certain extent among the different Member States, not only regarding their procedural and/or substantive nature, but also with respect to their content, degree and structure. Nevertheless, if there is one overarching theme dominating the European landscape of State liability for judicial breaches, it is that there is always a set of very stringent conditions making the practical application of such a principle very difficult.¹⁵⁷⁸

Even though the restricted approach in the various Member States is also apparent in Léger's analysis, he did not seem to take full account of these restrictions and the impact they have on limiting the overall application of State liability. In fact, even from the Advocate General's analysis in paragraphs 77 to 85 of his Opinion, it is apparent that out of the (then) fifteen Member States he expressly referred to, only a handful of countries recognize the principle of State liability for any kind of judicial breaches at all levels of courts (including courts adjudicating at last instance). It is therefore rather surprising that Léger, while briefly mentioning the existence of such restrictions, did not underline the large extent to which these substantive and procedural barriers restrain the individual's access to such a claim and in several instances even render it almost impossible in practice to lodge a successful damages action against the State.

¹⁵⁷⁸ In a similar vein, BERNHARD W. WEGENER, "Staatshaftung für die Verletzung von Gemeinschaftsrecht durch nationale Gerichte?" (2002) *EuR* 6, p. 791.

ii) Léger's perspective: courts of last instance in a Community of 15

Looking at the overall restrictions regarding liability claims for decisions of courts adjudicating at last instance only, the common features as to the application of such a principle are strong and highly visible, in that sense the Advocate General surely had a point. However, the strong commonalities are once again to be found at the level of restricting or entirely excluding the possibility of holding the State liable for harmful acts committed by national courts adjudicating at last instance. It is undeniable that most Member States adhere to a strict protection of the principle of *res judicata*, which in most cases clearly prevails over the individual's right to justice. The core consideration behind the principle of legal certainty is that every judicial procedure has to come to an irrevocable end at a certain point. This maxim and its wide ambit of protection for judicial acts *stricto sensu* is a crucial commonality across the European landscape. As a result, the possibility of a successful liability claim against a court adjudicating at last instance becomes close to impossible in most of the Member States, as every judicial decision taken at last instance automatically assumes the force of *res judicata*. While in some countries, such as Belgium, the principle of legal certainty exempts any judicial decision having become final entirely from liability proceedings,¹⁵⁷⁹ other Member States such as Austria¹⁵⁸⁰ and Sweden¹⁵⁸¹ limit the application of this restriction only to the highest courts within the national judicial hierarchy. In fact, taking into consideration the then fifteen Member States at the time of Léger's conclusions in *Köbler*, the following picture prevailed:

¹⁵⁷⁹ See graph on p. 408.

¹⁵⁸⁰ See graph on p. 227.

¹⁵⁸¹ Ibid.

EU MEMBER STATE	Total EXCLUSION of State Liability for Judicial Breaches under National Law	RESTRICTED Form of State Liability for Judicial Breaches under National Law...		PROCEDURAL Obstacles to a Comprehensive Recognition of State Liability for Judicial Breaches
		...depending on the SOURCE/NATURE of the judicial act	...limited by the degree of FAULT in the judicial violation	
Austria				
Belgium				
Denmark				
England				
Finland				
France				
Germany				
Greece				
Ireland				
Italy				
Luxembourg				
Netherlands				
Portugal				
Spain				
Sweden				

Contrary to Advocate General Léger's observation that "the principle of State liability for the acts or omissions of supreme courts can be acknowledged as a general principle of Community law",¹⁵⁸² even in a European Community of only fifteen Member States, the situation with respect to the principle of State liability for acts or omissions of supreme courts was more nuanced than that. In total, at least seven

¹⁵⁸² Opinion, Advocate General Léger in C-224/01, *Köbler*, *supra* note 1, para. 85.

Member States out of fifteen precluded the application of this principle when the decision stemmed from a court adjudicating at last instance. Hence, half the Member States at the time did in fact impose heavy restrictions on the invocation of State liability for acts performed by one of their courts of last instance. Some countries such as Sweden, Austria, Belgium and to a certain extent also Italy, did so expressly; other Member States like the United Kingdom, Greece, Ireland and the Netherlands, where there was a basic refusal to recognize a principle of State liability for judicial breaches by any court, did so implicitly. Therefore, it is questionable how the Advocate General arrived at his final conclusion that the principle of State liability for the acts or omissions of courts adjudicating at last instance could be acknowledged as a general principle of Community law. How can a concept which is rejected by at least half of all the Member States amount to a general principle of the Community?

4. Liability *à la Köbler*...Common in Diversity?

In our study on the liability regimes of Europe, we have attempted to set forth a coherent way of describing the various approaches of the legal systems to the concept of State liability for judicial breaches. What is then the final answer to the question we raised in the introduction to this chapter? The answer is that a common theoretical matrix of State liability for judicial breaches does not exist in Europe and that there are no general principles common to the laws of the Member States on this question. If there are, they exist only at a level of generality so broad as to be of little practical use. The only pertinent trend among the Member States which we could identify lies in the obstacles various national systems use to limit the application of such a principle in the various Member States. This was certainly the case in 2003 in a Community of fifteen Member States and it has again been confirmed in an enlarged Europe of twenty-seven.

The message which emerges can therefore be conveyed quite simply. The significant divergences that exist between the national regimes of State liability for judicial breaches and the newly established concept of Member State liability for such breaches at the Community level continue to plague the effective functioning of this

regime. The fact that it exposes the Member States to so many new conceptual and procedural challenges, which we have examined for each of our four groups of classification, should be proof enough that the *Köbler* line is far from ‘common’ to the laws of the Member States. There is no doubt that the extension of the *Francovich* line by the CJEU was legitimate. After all, the acknowledgment of the concept of Member State liability for judicial breaches is fully consistent with the Court’s previously established *Francovich* line. This holds true insofar as recognition of the aforementioned principle could have already been based on the CJEU’s reasoning in the *Konle* case where the Court had laid the basis for an all-inclusive definition of the concept of attribution with respect to the principle of Member State liability.¹⁵⁸³ What we do however dispute is that there is, as declared by Advocate General Léger and subsequently, in the CJEU’s ruling in *Köbler*, something like a general principle of Community law that reflects the commonalities existing between equivalent concepts under the national laws of the Member States.

As we have mentioned before, the concept of ‘principles common to the laws of the Member States’ is not a phrase invented by the Court of Justice, but is in fact an expression used in the Treaty of Rome to describe the origins of the system of extra-contractual liability of the Community itself, which is today regulated in Article 288(2) EC. Nevertheless, it seems like the Court and at times also the Advocate General are the only ones who know the secret spell for unravelling those ‘common principles’ and how to apply the magic formula for their interpretation.

¹⁵⁸³ C-302/97, *Konle*, *supra* note 7, para. 62 (emphasis added); see also C-46 & 48/93, *Brasserie*, *supra* note 4, para. 32.

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